87-716

No.

In The

Supreme Court of the United States

October Term, 1987

Reinhold Kulle,
Petitioner,

v.

U. S. Immigration and Naturalization Service,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Charles W. Nixon
Counsel of Record and
Robert A. Korenkiewicz
Attorneys for Petitioner
29 S. La Salle Street
Chicago, Illinois 60603
(312)-782-7450

QUESTIONS PRESENTED FOR REVIEW

1.(b) WHEN THE IMMIGRANT DELIVERED AN AUTHENTIC, ACCURATE DOCUMENT TO THE VISA EXAMINER IN CONJUNCTION WITH HIS VISA APPLICATION STATING THE IMMIGRANT HAD BEEN AN SS SERGEANT MARRIED AT GROSS ROSEN CONCENTRATION CAMP ON AUGUST 13, 1944 THEREBY DISPELLING ON THE PART OF THE EXAMINER ANY REASON TO BELIEVE OR RELY ON THE FALSE STATEMENT? 18

2. HAVE THE PROCEDURES EMPLOYED AND THE INADMISSIBLE EVIDENCE ADMITTED AT TRIAL SUBSTANTIALLY IMPAIRED THE INTEGRITY OF THE HEARING AND THE SUBSEQUENT FINDING, IN THAT, BUT FOR THAT EVIDENCE IT IS WHOLLY SPECULATIVE WHETHER THE FINDING THAT GROSS ROSEN A PLACE OF PERSECUTION RECAUSE OF RACE, RELIGION, NATIONAL ORIGIN, OR

TABLE OF CONTENTS PAGE

AT GROSS ROSEN CONCENTRATION CAMP DID NOT RENDER A REGULAR QUOTA APPLICANT INELIGIBLE FOR A VISA AT THE TIME OF IMMIGRATION.

1.(b) THE IMMIGRANT DELIVERED AN AUTHENTIC, ACCURATE DOCUMENT TO THE VISA EXAMINER IN CONJUNCTION WITH HIS VISA APPLICATION STATING THE IMMIGRANT HAD BEEN AN SS SERGEANT MARRIED AT GROSS ROSEN CONCENTRATION CAMP ON AUGUST 13, 1944 THEREBY DISPELLING ON THE PART OF THE EXAMINER ANY REASON TO BELIEVE OR RELY ON THE FALSE STATEMENT.

2. THE PROCEDURES EMPLOYED AND THE INADMISSIBLE EVIDENCE ADMITTED AT TRIAL SUBSTANTIALLY

Appendix

TABLE OF AUTHORITIES
CASES

OTHER AUTHORITIES

STATUTES INVOLVED

A. Deportation

8 USC Sec. 1251(a)(19) -- [persecution]

(19) during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with--

(A) the Nazi government of Germany,

(B) any government in any area occupied by the military forces of the Nazi government of Germany,

(C) any government established with the assistance or cooperation of the Nazi government of Germany, or

(D) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

8 USC Sec. 1251 -- [fraud or wilful misrepresentation]

General classes of deportable aliens
(a) General classes. Any alien in the United States ... shall, upon order of the Attorney General, be deported who --

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry.

8 USC Sec 1182(19) -- Excludable aliens. [classes]

(19) Any alien who . . . has procured a visa . . . by fraud, or by willfully misrepresenting a material fact;

B. Waiver of Deportation

8 USC Sec. 1251(f)

(f) Relationship to United States citizen or lawfully admitted alien as affecting deportation for fraudulent entry. (1)(A) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure or have procured visas or other documentation, or entry into the United States, by fraud or misrepresentation, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in subsection (a)(19) who

(i) is the spouse, parent or child of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(ii) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such entry except for those grounds of inadmissibility specified under paragraphs (14), (20), and (21) of section 212(a) [8 USCS Sec. 1182(14), (20), (21)] which were a direct result of that fraud or misrepresentation.

(B) A waiver of deportation for fraud or misrepresentation granted under subparagraph (A) shall also operate to waive deportation based on the grounds of inadmissibility at entry described under subparagraph (A)(ii) directly resulting from such fraud or misrepresentation.

C. Suspension of Deportation

8 USC Sec. 1254(a) eff. 12/29/81

(a) Adjustment of status for permanent residence; contents. As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an alien described in section 241(a)(19) [8 USCS Sec. 1251(a)(19)] who applies to the Attorney General for suspension of deportation and --

D. Termination of Social Security Benefits

42 USC Sec. 402(n)

(n) Termination of benefits upon deportation of primary beneficiary. (1) If any individual is (after the date of enactment of his subsection [September. 1, 1954]) deported under paragraph (1),(2), (4), (5), (6), (7), (10), (11), (12), (14), (15), (16), (17), or (18) of section 241(a) of the Immigration and Nationality Act [8 USCS Sec. 1251(a)], then, notwithstanding any other provisions of this title--

(A) no monthly benefit under this section or section 223 [42 USCS Sec. 423] shall be paid to such individual, on the basis of his wages and self-employment income, for any month occurring (I) after the month in which the Secretary is notified by the Attorney General that such individual has been so deported, and (II) before the month in which such individual is thereafter lawfully admitted to the United States for permanent residence.

(B) If no benefit could be paid to such individual (or if no benefit could be paid to him if he were alive) for any month by reason of subparagraph (A), no monthly benefit under this section shall be paid, on the basis of his wages and self-employment income, for such month to

any other person who is not a citizen of the United States and is outside the United States for any part of such month, and

(C) no lump-sum death payment shall be made on the basis of such individual's wages and self-employment income if he dies (i) in or after the month in which such notice is received, and (ii) before the month in which he is thereafter lawfully admitted to the United States for permanent residence. Section 203(b), (c), and (d) of this Act [42 USCS Sec. 403(b), (c), (d) shall not apply with respect to any such individual for any month for which no monthly benefit may be paid to him by reason of this paragraph.

(2) As soon as practicable after the deportation of any individual under any of the paragraphs of section 241(a) of the Immigration and Nationality Act [8 USCS Sec. 1251(a)] enumerated in paragraph (1) in this subsection, the Attorney General shall notify the Secretary of such deportation.

No.

In The

Supreme Court of the United States

October Term, 1987

Reinhold Kulle,
Petitioner,

v.

U. S. Immigration and Naturalization Service,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Reinhold Kulle, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on August 5, 1987.

OPINIONS BELOW

The opinion of the Seventh Circuit is reproduced as App. A. The opinion of the Board of Immigration Appeals is reproduced as App. B.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 5, 1987. (App. C). No Petition for Rehearing was filed. Jurisdiction of this Court is invoked under 28 U.S. C. Section 1254(1).

STATUTES INVOLVED

The relevant portions of statutes are reproduced in a preceding portion of this Petition.

STATEMENT OF THE CASE

Mr. Kulle was born in 1921 in the province of Silesia then a part of Germany. His 100% accurate visa application was submitted and granted as a regular quota immigrant visa, and he arrived in the United States in 1957.

Kulle, then a teenager, joined the Waffen SS serving until the end of the war. He never joined the Nazi party. He was trained and sent to France. He

then was sent into the Soviet Union where he was wounded on three different occasions, the last wound was debilitating. During convalescence he was ordered to report to Gross Rosen concentration camp in Silesia, Germany. He requested a transfer back to the front. His request was denied. From the fall of 1942 until January, 1945 he served as a member of the outside battalion guard and trained troops for front line duty. There was no allegation or proof that he personally struck or injured a prisoner nor was there an allegation or proof he had any power or authority to control the living conditions of the prisoners at this labor camp. Gross Rosen did not have gas chambers.

The Office of Special Investigations, (OSI), filed an Order of Show Cause alleging Kulle participated in the persecution of persons on account of their race, religion, national origin or political opinion under the 1978 Holtzman amendment codified as 8 USC 1251(a)(19).

The Order to Show Cause also charged that Kulle procured his visa by misrepresenting a material fact, 8 USC 1182 (a)(19), and he therefore did not possess a valid visa pursuant to 8 USC 1215(a)(2).

Mr. Kulie denied all charges.

Kulle requested a bill of particulars, production of documents and a list of witnesses. The OSI supplied his precharge statement with exhibits used at the taking of that uncounseled statement by the opposing attorney. All pretrial requests for other materials were denied. A mandamus suit was brought seeking the aid of the district court. The court ruled it lacked jurisdiction. Kulle v. Springer, 566 F.Supp. 279 (N.D. Ill. 1983).

At the hearing the OSI evidence admitted consisted of the testimony of a former Foreign Service Officer who had served in Frankfurt, Germany, an affidavit of the actual visa examiner, the testimony of four former Gross Rosen camp inmates, a professor of German history, several

text books, a book written by one of the former Gross Rosen camp inmates, and some Nuremberg and Ludwigsberg documents. Mr. Kulle testified. He also presented the testimony of several witnesses and dozens of affidavits as to his reputation and character while in the United States.

The issue of misrepresenting a material fact was based upon Mr. Kulle's pretrial statement wherein he said he lied to the American government by saying he was in the German Army when he was in the Waffen SS since, as he said, the Waffen SS was connected to the concentration camp question. In the self-same statement Kulle said that he did not lie in the application for visa, nor did he lie to anyone in an interview. He said he lied in the sense that he did not reveal this information. But nobody asked and he did not volunteer the information. The visa application is completely accurate.

OSI presented the testimony of the former Foreign Service Officer who said that there was a

preliminary information sheet required. That the sheet asked for military service. Kulle requested its production. OSI refused. Kulle offered a preliminary information sheet of near date, but not covering the exact date of application. This sheet does not request military service information nor any information that raises the Waffen SS or concentration camp question. The Foreign Service Official agreed it was substantially the same as used at the time of Kulle's visa and that the law had not changed during the period in question. The Foreign Service Official said that he would not have granted a visa to a concentration camp guard and so did the affidavit of the actual visa examiner. But OSI referred to no rule, regulation or written material of any kind showing the exclusion of Waffen SS or a concentration camp guard from regular quota visas.

The issue of persecution consumed the vast bulk of the evidence. There was no historical evidence referring to Gross Rosen as a place of

persecution as with other concentration camps. The only reference to Gross Rosen in any of the many generally recognized texts was that Gross Rosen was populated predominately by criminals, inferring that persons were not incarcerated there because of race, religion, national origin or political opinion but due to criminal acts. Charles Sydnor, the OSI historian, had written a book and several articles about the SS and German concentration camps but had not mentioned Gross Rosen. Each of the four former inmate witnesses testified to their commission of criminal acts including taking up arms against the government, illegal underground activities and striking a policeman with a club. Each of the four inmate witnesses and Sydnor said there were many deaths at the camp. Sydnor, basing his opinion substantially upon former inmate, Moldawa's, book, said Gross Rosen was a place where inmates were persecuted because of race, religion, national origin, or political opinion. The former inmate, Moldawa, made no notes,

consulted no other former inmates, reviewed no documents and first wrote his book of remembrances thirty-five years after his release from Gross Rosen.

The immigration judge, (IJ), ordered Mr. Kulle deported based upon participation in persecution and denied the applicability of any discretionary relief due to the statutory scheme denying all such relief to Nazi "war criminals."

The IJ refused to rule on the issue of misrepresenting a material fact. The judge stated: "Inasmuch as this finding [of participation in persecution] is dispositive of the case before me, and the evidence in this regard is the clearest aspect of the case presented, this decision will be resolved on this issue alone." Decision of the IJ, page 4.

Appeal was timely taken to the Board of Immigration Appeals, (BIA). The BIA affirmed the finding of deportability on the basis of participation in persecution and reversed the IJ holding Kulle deportable on the additional ground of misrepresenting a material fact.

Petition for Review was filed in the Seventh Circuit which affirmed the BIA decision.

REASONS FOR GRANTING THE WRIT

1. THE STATEMENT BY A REGULAR QUOTA IMMIGRANT WHO HAD BEEN A GUARD AT GROSS ROSEN CONCENTRATION CAMP, "I WAS IN THE ARMY", IS NOT A MATERIAL, FRAUDULENT MISREPRESENTATION.

Materiality is an issue soon to be carefully considered by this Court in a denaturalization case. On June 30, 1987 the Supreme Court entered the following order in the case of Kungys v. United States, No. 86-228, now pending:

> The case is restored to the calendar for reargument. The parties are directed to file supplemental briefs addressing the following questions:
>
> (1) Whether petitioner is subject to denaturalization for want of good moral character under 8 U.S.C. Sections 1451(a), 1427(a), and 1101(f)(6), with particular attention to:
>
> (a) whether the "false testimony" provision of 8 U.S.C. Section 1101(f)(6) should be interpreted to include a requirement that the false testimony concern a material fact;

(b) what standards should govern the determination under U.S.C. Section 1101(f) whether "false testimony" has been given "for the purpose of obtaining any benefits under this chapter . . . "; and

(c) whether the latter determination is one of law or fact.

(2)(a) Should the materiality standard articulated in Chaunt v. United States, 364 U.S. 350 (1960) be abandoned and, if so, what standard should govern the materiality inquiry under 8 U.S.C. Section 1451(a); and

(b) is the determination of materiality under 8 U.S.C. Section 1451(a) one of law or fact.

(3) When a misrepresentation has been established as "material" within the meaning of 8 U.S.C. Section 1451(a), must any further showing be made to establish that citizenship was "procured by" that misrepresentation.

The Seventh Circuit held that the statement by Petitioner was false and material. It based its decision on the holdings in two cases: (1) A forfeiture case; "United States v. One Lear Jet Aircraft, 808 F.2d 765, 773 (11th Cir. 1987) (area of 'potential significance'); (2) The case now subject to this Court's review, Kungys v. United

States, 793 F.2d 516 (3d Cir 1986) (Certiorari granted to explore 'material' under 8 U.S.C. Section 1451(a))." The "area of 'potential significance'" test has never been applied to denaturalization or deportation. In fact, the Chaunt test as set forth in, Chaunt v. United States, 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960) states:

> "that either (1) facts were suppressed 'which, if known, would have warranted denial of citizenship' or (2) that their disclosure 'might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.'"

See, 364 U.S. at 355. This was the test applied in Kungys by the Third Circuit and has been applied to false statements at the visa stage uniformiy. Maikovskis v. INS, 773 F.2d 435, 441 (2d. Cir 1985). However, the Supreme Court has been reluctant to rule in this area in its most recent opinion, Fedorenko v. United States, 449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d 686 (1981). There the majority held that Fedorenko had

failed to comply with the Congressionally imposed prerequisites thereby avoiding a clarification involving the materiality standard and distinguished Chaunt by noting that the facts in that case covered misrepresentations made in the actual application for naturalization, whereas the facts in Fedorenko concerned misrepresentations made in the initial application for a visa. See 101 S.Ct. at 748-49. The concurring and dissenting opinions touched upon the materiality issue employing varying standards.

The Kulle case now seeking certiorari raises these several issues in a deportation setting that require the application of Chaunt and touches on other issues essential to materiality.

Deportation is authorized when an "alien ... has procured a visa ... by fraud, or by willfully misrepresenting a material fact" .... 8 U.S.C. Sec 1182(19). These matters are set forth in the following sections.

1.(a) HAVING BEEN AN SS GUARD AT GROSS ROSEN CONCENTRATION CAMP DID NOT RENDER A REGULAR QUOTA APPLICANT INELIGIBLE FOR A VISA AT THE TIME OF IMMIGRATION.

The use of the word "procured" means that the fraud or wilful misrepresentation must have been a necessary inducement to the granting of the visa. However, here, Mr. Kulle was eligible for the visa and the fact that he had been a guard at Gross Rosen concentration camp or a member of the SS would not have disqualified him from the visa. Therefore, any wilful misrepresentation was not a basis upon which he "procured" the visa.

Mr. Kulle was a regular quota immigrant under the 1952 Act. He was not processed nor admitted under the Displaced Persons Act as were Fedorenko and Kungys, the only other "war criminal" cases considered by the Supreme Court. For example, this Court held that Fedorenko's visa and citizenship were illegally procured since "[t]he Act's [DPA] definition of

'displaced persons' eligible for immigration to this country specifically excluded individuals who had 'assisted the enemy in persecuting civil[ians]' or who had 'voluntarily assisted the enemy forces ... in their operations ...'" Fedorenko v. United States, 449 US at 495 and that Fedorenko (now executed by the Soviet Union) had been a concentration camp guard at the Nazi death camp Treblinka thereby assisting the enemy in persecuting civilians.

However, the Immigration and Naturalization Act of 1952 contained no such prohibition. There were twenty-four excludable classes provided by the Act from (1) persons who have had one or more attacks of insanity to (24) persons who at any time, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law. The Immigration and Naturalization Act in force in 1957 contained no such excludable classes as the Displaced

Persons Act. It contained no prohibition excluding those who assisted in persecuting or assisted the enemy forces. There is no showing of any lawful basis upon which Mr. Kulle would have been excludable in 1957 -- the time of his application. The government failed to introduce into evidence of refer to, either themselves or by a witness, any statute, rule, regulation or any other basis -- other than prejudice -- upon which to base denial of Kulle's visa.

The Holtzman Amendment, 8 U.S.C. 1251(19) authorizing the deportation of aliens who "assisted in persecution" was not intended as a meaningless Act. It does not merely restate the disqualifications of the Displaced Persons Act of 1948, 62 Stat.1009, without reason. This Court held in Fedorenko one who "assists in persecution" is not lawfully admitted to the United States under the specific prohibition of the Displaced Persons Act. See, 449 U.S. at 509. Likewise, Congress recognized that a regular

quota immigrant, such as Kulle, did not fall under the prohibitions of the Displaced Persons Act: "deportation of these individuals is not possible, even if engagement in atrocities can be proven." It intended the Act to provide expanded coverage by "eliminating an undesirable loophole ..." H.R. Rep No. 1452, 95th Cong., 2d Sess 6, reprinted in [1978] U.S. Code Cong. Ad. News 4700, 4702.

Thus, indeed, the Holtzman Amendment was enacted specifically to make excludable the category of persons not otherwise rendered deportable under the 1952 Act.

In accord, United States v. Kairys, 600 F.Supp. 1254, 1266, f.n. 5: But, "... a German who voluntarily served in such units as the Waffen SS (Kulle's unit) was eligible to be a quota immigrant unless he was implicated in war crimes."

The testimony of former Foreign Service Officer Coffey gives no lawful basis for the

denial of a visa to Kulle in 1957. Coffey admitted he was required to follow the law as Congress promulgated it and not make up his own rules. Yet Congress did not provide for the exclusion of the SS or concentration camp guards. No statute, rule, regulation or directive concerning excludability was introduced to support the proposition that Kulle was excludable had the facts concerning his connection with Gross Rosen been expressly considered.

It is important to note that the immigration judge who heard the evidence held against Mr. Kulle on the issue of assistance in persecution held against him because of mere presence as a member of the outside guard battalion. She elected not to decide the question of wilful misrepresentation: "Inasmuch as this finding (as to persecution) is dispositive of the case before me, and the evidence in this regard is the clearest aspect of the case presented, this decision will be resolved on this issue alone."

The Seventh Circuit's total statement concerning materiality is: "We also agree with the government that the misrepresentation concerned a 'material' fact, Kulle's service at Gross-Rosen, insofar as it closed off a relevant line of inquiry which could designate him excludable. [This is the second prong of the Chaunt test, not a finding of per se excludability.] Ms. Geoghegan testified [she did not, her affidavit was submitted over objection] that service in the Waffen SS was a significant factor in the visa process. She claimed she would have denied an immigrant visa to any former SS member who had guarded concentration camp prisoners." Slip Op., page 15.

The Seventh Circuit failed to find Kulle excludable per se due to the guard service. Therefore, the decision rests on only one of several possible interpretations of the second prong of the Chaunt test. Note the briefing instructions of this Court in Kungys, supra. It is

the meaning of the second prong of the Chaunt test, or its viability that will be decided in Kungys.

1.(b) THE IMMIGRANT DELIVERED AN AUTHENTIC, ACCURATE DOCUMENT TO THE VISA EXAMINER IN CONJUNCTION WITH HIS VISA APPLICATION STATING THE IMMIGRANT HAD BEEN AN SS SERGEANT MARRIED AT GROSS ROSEN CONCENTRATION CAMP ON AUGUST 13, 1944 THEREBY DISPELLING ON THE PART OF THE EXAMINER ANY REASON TO BELIEVE OR RELY ON THE FALSE STATEMENT.

An essential element of fraud is sometimes denoted as "reasonable reliance". Assuming that Mr. Kulle made the wilful misrepresentation -- "I was in the army",[1] there was no allegation and no showing of reasonable reliance. Therefore, the order cannot stand as a matter of law.

---

1 At a precharge interview without an attorney, Mr. Kulle stated to opposing attorney, Einhorn, that he lied to the United States. However, later, but in the self same interview, when given the opportunity, Mr. Kulle explained that the visa application was 100% correct (which it is) and that he did not lie in an interview -- he lied in the sense that he did not reveal he had been an SS guard, but no one had asked. See Slip Op. pp.12-14.

All denaturalization and deportation cases tacitly assume reasonable reliance. Such reasonable reliance is and should be a necessary element.

The Restatement of the Law of Torts, American Law Institute, Volume III, Ch. 22, Section 540. Duty to Investigate, states:

> "The recipient in a business transaction of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation."

However, the broad rule is qualified in the "Comment" to Section 540 in such a situation as obtains here:

> "On the other hand, if a mere cursory glance would have disclosed the falsity of the representation, its falsity is regarded as obvious under the rule stated in Section 541."

Mr. Kulle was found to have made a wilful misrepresentation -- "I was in the army." -- to the visa examiner. But at the same time Mr. Kulle handed the visa examiner his marriage certifi-

cate that stated the truth: "SS Sergeant Reinhold Kulle was married at Gross Rosen concentration camp." A mere cursory glance at that document by the examiner would have disclosed the falsity of the representation. The Restatement of the Law of Torts, in effect at the time of the passage of the statute involved, was the prevailing view of United States law which Congress should have had in mind upon passage of the Act.

The absence of "reasonable reliance" has been a determining factor for a long time in matters of wilful misrepresentations. Slaughter v. Gerson, 13 Wall (US) 379; 20 L.Ed. 627, 628 (1872) held:

> "This misrepresentation which will vitiate a contract of sale, and prevent a court of equity from aiding its enforcement, must not only relate to a material matter constituting an inducement to the contract, but it must relate to a matter respecting which the complaining party did not possess at hand the means of knowledge and it must be a misrepresentation upon which he relied, and by which he was actually misled to his injury."

The government elected not to produce the testimony of the visa examiner, Ms. Geoghegan, who had issued Kulle's visa. She is the only person who could have shed any light for or against reasonable reliance, or for that matter, on misrepresentation. The burden of proof shifted to the government upon the proof that an accurate marriage certificate was submitted to Ms. Geoghegan indicating Mr. Kulle's SS concentration guard service. The government electing not to call her as their witness failed to sustain its burden.

2. THE PROCEDURES EMPLOYED AND THE INADMISSIBLE EVIDENCE ADMITTED AT TRIAL SUBSTANTIALLY IMPAIRED THE INTEGRITY OF THE HEARING AND THE CONSEQUENT FINDING, IN THAT, BUT FOR THAT EVIDENCE IT IS WHOLLY SPECULATIVE WHETHER THE FINDING THAT GROSS ROSEN WAS A PLACE OF PERSECUTION BECAUSE OF RACE, RELIGION, NATIONAL ORIGIN, OR POLITICAL OPINION WOULD HAVE BEEN MADE.

2.1 INTRODUCTION

This Court should grant certiorari under its power of supervision pursuant to Rule 17 of the Rules of Practice. The Seventh Circuit has sanctioned a substantial departure from the accepted and usual course of proceedings by the Immigration Court, thereby bringing immigration hearings into disrespect. These substantial departures are: (1) Expressed prejudgment by and prejudice of the finder of fact (2) Failure to afford a reasonable opportunity for cross-examination to test direct evidence (3) The admission and reliance on manufactured "expert" testimony and massive inadmissible evidence.

Each of these factors, in conjunction with each other, constitute deprivation of the right to a fair hearing. "Meticulous care must be exercised lest the procedure by which he is deprived of that liberty [by deportation] not meet the essential standards of fairness." Bridges v. Wixon, 326 U.S. 135, 154 (1945). "... where evidence was improperly received and where but

for that evidence it is wholly speculative whether the requisite finding would have been made. Then there is deportation without a fair hearing ..." Bridges v. Wixon, 326 U.S. 135, 156 (1945).See also, Bilokumsky v. Tod, 263 U.S. 149 (1923).

Here Petitioner admitted by answer: first, he was a member of the SS and second, he was an outside perimeter guard at Gross Rosen concentration camp. If the establishment of these two facts was all that was necessary to support the order of deportation, then OSI could have merely moved for a summary disposition. But the dispositive issue is whether or not Gross Rosen was a place where individuals were incarcerated because of race, religion, national origin, or political opinion.

This Court may have a broader standard of review of the evidence than at the time of Bridges, supra. Certainly the underlying standard of proof is higher. In deportation cases

this Court requires the introduction of clear, unequivocal and convincing evidence to meet the government's burden of proof. Woodby v. INS, 385 U.S. 276, 285 (1966).[2]

The review by the Seventh Circuit did refer to Woodby, supra, and stated: "We think, first, that the government established deportability by 'clear, unequivocal, and convincing evidence'" Slip Op. at page 10. However, the Seventh Circuit did not acknowledge that it had the power and duty to undertake a Baumgartner examination of the record. This is particularly alarming where the Immigration Judge refused to rule on the charge of visa fraud and her decision not to rule was "reversed" by the Board and the

---

2 This is the identical burden of proof required in denaturalization cases. Schneiderman v. United States, 320 U.S. 118 (1943). As this Court held in the subsequent case of Baumgartner v. United States, 322 U.S.665, 671 (1944), that careful review of the lower court's "findings of fact" was "a question of law" necessary to ensure compliance with the burden of proof established in Schneiderman -- clear and unequivocal -- such review is mandated here in connection with deportation due to the identical burden of proof.

Board upheld by the Seventh Circuit thereby modifying the findings and bringing them into question.

Even if a Baumgartner review is not warranted, the procedures employed did not constitute a fair trial under prior rulings. A review of the underpinnings of the evidence and the gross improprieties in the "evidence" and procedures is necessary.

2.2 ELEMENT OF PROOF ABSENT

This review concerns one essential element required by the Holtzman Amendment: The prisoners at Gross Rosen must have been incarcerated due to race, religion, national origin or political opinion. This element is lacking. The OSI witnesses were imprisoned for the

commission of crimes.[3] 8 USC Sec. 1251(a)(19), (Holtzman Amendment) provides:

(19) during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with--

(A) the Nazi government of Germany,

(B) any government in any area occupied by the military forces of the Nazi government of Germany,

(C) any government established with the assistance or cooperation of the Nazi government of Germany, or

(D) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion,[4] national origin, or

---

3 OSI selected only four former Gross Rosen prisoners as witnesses and revealed no others to the defense. Each of these four witnesses testified to their commission of criminal acts of a nature recognized by all civilized nations as crimes that account for their incarceration there. (1) Lubash struck a policeman with a pipe: (2) Kozlowski twice escaped from his work assignment and attempted to employ arms against the government: (3) Wojciechowski engaged in illegal underground activities knowing they were illegal: and (4) Moldawa was a repeat offender, first arrested for attempting to take up arms against the government imprisoned, released and rearrested for illegal border crossing to take up arms.

4 Lubash testified that Jews were not admitted to Gross Rosen. Wojciechowski knew there were few Jews in Gross Rosen. There is no evidence in the record that the few Jews in Gross Rosen were there because they were Jews.

political opinion.[5] [emphasis supplied].

2.3 EXPRESSED PREJUDGMENT BY AND PREJUDICE OF THE FINDER OF FACT

Counsel for Respondent persisted in his duty to impeach the OSI expert. Judge Springer threatened counsel with twenty lashes.

OSI witness, Lubash, was impeached by substantial omissions in his prior statements. The judge, without O.S.I. objection, on her own initiative stated: "..with respect to any omissions in Exhibit 48...I think that you have exhausted that line of questioning..." Respondent represented to the court there are more major omissions. The court: "well, you have exhausted me...." "...I didn't want you to cross-examine him on the fact certain statements don't appear..." [impeachment by omission of material facts].

---

5 "The committee does not intend that the persecution language of [the Holtzman Amendment] include general prosecutions for criminal offenses, unless for an offense which is 'purely political' in nature." U S Code Congressional and Administrative News, Vol 4, 95th Congress, 2d Session, p. 4700, 4704 (1978)

OSI witness, Moldawa, was being impeached by critically material omissions from his 400 page book. The judge abandoned her role as an impartial finder of fact; she ordered counsel to cease and desist from impeachment; she characterized impeachment as badgering the witness and accused counsel of attempting to usurp her authority.

It is all to human to brand everyone and anyone who had anything to do with any of the camps as the cause of such human suffering due to an innocent person's race, religion or political opinion. As Francis Bacon observed:

> "The human understanding when it has once adopted an opinion, either as being the received opinion or as being agreeable to itself, draws all things else to support and agree with it. [The evidence] . . . it either neglects and despises, or else by some distinction sets aside, and rejects; in order that by this great and pernicious predetermination the authority of its former conclusions may remain inviolate."

Franciscus de Verulamio sic cogitavit. Isn't this what the Nazis in control did? Unwittingly the

Judge displayed her adherence to pernicious predetermination of the outcome of this case by her threats to counsel, her false accusation of badgering the witness and her admission she did not want the witnesses impeached.

2.4 FAILURE TO AFFORD A REASONABLE OPPORTUNITY FOR CROSS-EXAMINATION

2.4i LACK OF DISCOVERY

Discovery was essential; all discovery requests were denied. It was clear that the trial of this case was not going to be a short, simplified matter. It was expected that OSI would call expert witnesses, any number of former inmates of Gross Rosen, visa examiners and employ gruesome evidence in an emotionally charged atmosphere. The evidence might include substantial documentation. The survivor witnesses would feel strong emotions. Requests were made for a list of witnesses and documents by way of a bill of particulars and other conventional motions and notices. Judge Springer is not

denied the power to enter such discovery and she had discretion to permit discovery. Quattrone v. Nicolls, 210 F.2d 513 (1st Cir. 1954), cert. den. 347 U.S. 976. All requests were denied. Mandamus relief was requested of the district court. The court held it lacked jurisdiction. Kulle v. Springer, 566 F. Supp. 279 (N.D. Ill. 1983).

OSI supplied, prior to trial, Mr. Kulle's uncounseled statement to OSI, and the exhibits thereto. It supplied a copy of Sydnor's book shortly before he testified and Moldawa's book, upon which Sydnor relied, the day before his testimony began. Some other materials were supplied at the time they were offered, referred to in testimony or shortly before a witness took the stand. It was impossible to correlate a half dozen books and the voluminous documents referred to by witnesses to demonstrate to the finder of fact the inconsistencies and lack of weight within the OSI case without substantial advance inspection.

2.4ii ESSENTIAL MATERIALS SUPPRESSED

2.4ii(a) LUDWIGSBERG PAPERS

The Ludwigsberg papers are documents developed by the German War Crimes prosecutor's office--OSI redacted material portions of these documents to keep them from the defense for reasons of their own--OSI even redacted portions from Sydnor's review for their own reasons.

2.4ii(b) LACK OF STATEMENTS

Immigration and displaced person statements of future witnesses showing their whereabouts and activities during the war were requested and their production denied. These immigration records were under the control of the immigration judge and OSI.

Mr. Wojciechowski testified that his displaced person and visa applications showed his then version of his whereabouts and activities during the war. Jencks production was requested and denied. The court was not

interested in whether or not the witness had been a Nazi collaborator.

Witness Kozlowski testified that his visa and displaced person forms showed his whereabouts and activities during the war. Jencks production was likewise requested and denied. Kozlowski admitted he had claimed to have been a prisoner of war. But his testimony here did not support it. What other false statements he and other witnesses made under oath, OSI and the court agreed to hide.

Where "war crimes" are the basis of deportation and testimony concerns events forty and more years ago, the Jencks Rule, 18 USC 3500(d), applies and the judge should have striken the testimony of Wojciechowski and Kozlowski or have declared a mistrial. See Matter of C., 8 IN 696 (1960) and Matter of L., 9 IN 14 (1960). Instead the trial court, the Board of Immigration Appeals (BIA) and the 7th Circuit relied upon their testimony. Refusal to produce

pre-hearing deportation statement of a witness bearing on an important issue where the testimony was credited by the immigration judge and BIA without a showing or claim of privilege is prejudicial error. Carlisle v. Rogers, 262 F.2d 19 (DC Cir, 1958). Worst than this conduct was the refusal to produce the statement OSI claimed Kulle must have given the government in 1957 that forms the very basis of OSI's claim of visa fraud.[6]

2.5 THE ADMISSION AND CONSIDERATION OF BOOK OF REMEMBRANCES AND OF "MANUFACTURED" EXPERT

The missing necessary element of OSI's prima facie case is that prisoners were held at Gross Rosen due to race, religion, national

---

6 The attitude of OSI counsel throughout the trial is overtly expressed at the time production of this critical statement was requested: "... if [counsel] is making a mandatory discovery request of the government, the government feels obliged to treat it the same way as it has treated all mandatory discovery requests, in the negative ... there is no mandatory discovery in this Court.

origin or political opinion and not due to criminal acts.[7]

The OSI expert, Sydnor, mentioned only four generally recognized historical works as authorities in connection with German concentration camps. The only reference to Gross Rosen in all of those texts stated that it was a camp predominately for criminals.[8] Sydnor's text did

---

7 Footnote 3 on Page 26 reviews the fact that each former prisoner witness was imprisoned as a criminal and their testimony did not "prove" imprisonment because of political opinion. Footnote 4 on page 27 reviews the fact that there were few Jews in Gross Rosen and that the testimony of the former prisoner witnesses did not "prove" imprisonment because of race or religion. There remain only two other sources of "evidence" bearing on this essential element: Moldawa's book and Sydnor's opinion testimony. That each of these is worthless is demonstrated in this section.

8 The Kogan book makes reference to Gross Rosen as a camp populated predominately by criminals. Contrary to OSI's fanciful, vituperative and unsupported assertions concerning German "edicts" and "unconvicted" civilians, not one of its witnesses were incarcerated <u>because</u> of that "they were," i.e. Slavs, Jews, etc.. But due to crimes of each inmate. Gross Rosen admitted only a very small number of Jews during the time Mr. Kulle was assigned there. Moldawa testified he received a short trial and was sentenced to life in a concentration camp. OSI failed to ask any other inmate witness whether they had received a trial. No "edicts" were introduced into evidence. Persecution was not established by evidence; it was established by impressions, derived extra-judicially. These "impressions" were reinforced by the film of the Mauthausen liberation--a place

(continued on next page)

not mention Gross Rosen. Sydnor admitted his study of Gross Rosen had only first begun a few months prior to trial and at the specific request of the prosecutor in this very case. Sydnor admitted that Moldawa's book was the principal source material he used for his testimony about Gross Rosen. It will be demonstrated in this section that the Moldawa book relied upon by Sydnor to form the basis of his opinion that Gross Rosen was a place of persecution is unreliable and inadmissible. Therefore, Sydnor's opinion is without sufficient foundation.

The credible evidence: the recognized historical text credited by Sydnor as authoritative, stating that Gross Rosen was predominately for criminals, and the testimony of the former criminal inmates, showed the camp for what it was; a prison for those convicted of offenses against the criminal law. Apparently O.S.I. was

---

Mr. Kulle never served as guard.

aware of this fact prior to the trial and it was this awareness which must have prompted it to "manufacture" its expert testimony to fit its preconceived notion of what it supposed the camp must have been as distinguished from what it, in fact, was. Manufacture may seem to be a harsh term to apply, but it is, nevertheless, the most accurate term available to describe that portion of the evidence which dealt with the history and conditions of the camp.

The standard historical works on the subject of Nazi persecution, works which describe in great detail the history and purpose of the Nazi concentration camp system in general and the particular camps which made up that system, make absolutely no reference to Gross Rosen as stated in footnote 8 above. This fact also applied to the written works of the prosecution's Gross Rosen "expert", Charles Sydnor. While he admitted writing one book and several articles concerning the SS and the con-

centration camp system he could point to no reference in any of his own materials, in addition to the materials of the better known authors, and works which the witness claimed were reliable authorities on the subject, where Gross Rosen is included among those concentration camps where it is generally accepted that persecutions did occur. It simply strains credulity to the breaking point to believe that Gross Rosen, or "Little Auschwitz" as Sydnor, without support, liked to claim that it was called, could have been overlooked by the various qualified historians who, over the years, have researched, studied and written about the systematic persecution practiced by the Nazis in certain camps both within and outside of Germany proper.

Undaunted by the absence of any reliable historical data connecting Gross Rosen to the Nazi persecution network, the prosecution located Moldawa, the author of Gross Rosen, a Concentration Camp in Upper Silesia. Having

located this data, the prosecution had found the linchpin for its proposition that Gross Rosen was a place of persecution. That proving that Gross Rosen was a place of persecution and that Mr. Kulle "assisted" in that persecution, is the linchpin of the prosecution's case against Kulle should not be subject to argument. Without such proof there are no other facts in his background which could even arguably be chargeable under 8 U.C.S. Section 1251(a)(19). However, as with any linchpin, if it fails to hold firm, the proposition falls. Such is the case here.

This so-called history of Gross Rosen is simply the pejorative and tendentious ramblings of a very bitter man. As a "historical work" it is without parallel. It contains neither an index nor a bibliography. While it is replete with footnoted material, a cursory examination of the footnotes demonstrates that they contain no citation to authority but, rather, are merely the vehicle

utilized by the author to make parenthetical statements. In some cases, the footnotes contain direct quotations attributed to well-known Nazi personages of the time. But, once again, the author gives no citation of authority.[9] Further, he is fond on setting out some facts in excruciatingly minute detail, such as hundreds of individual prisoner's numbers, or the exact dates certain claimed events occurred or the exact number of prisoners involved in certain events, or the number entering or leaving the camp or the like. Yet, on cross-examination the witness admitted that he kept no diary nor had he otherwise made notes or memoranda to himself while he was, as he claimed, at Gross Rosen. He further admitted that he performed absolutely no research in libraries, archives, or the like in order to aid him in the writing of this "history".

---

9 Sydnor utilized substantial research sources and bibliography in the preparation of his own work on the Totenkopf Division, the division to which Kulle was attached.

Moldawa testified, in substance, that the book is a product of his own memory. He made this admission notwithstanding the fact that he also admitted that the "history" begins at a point in time approximately 16 months prior to his alleged arrival -- a point in time at which he could have had no memory of the camp. Incredibly, the book was written in 1979, thirty-five years after the last of the events mentioned in the book![10]

Since Sydnor's testimony relied upon this inadmissible book by Moldawa, it was absolutely necessary that Sydnor find a way to credit it. Sydnor's first attempt to credit Moldawa's book aborted. Sydnor testified Moldawa's book was reliable because Moldawa consulted German documents, researched in

---

10 Notes made thirty-five years after an event do not qualify as past recollection recorded. It can not be seriously contended that "the record was made at a time when the matter was fresh in the witness' memory." Fed. Rules of Evid., 803(5). The Moldawa book was inadmissible.

Polish Archives and libraries and studied transcripts of contemporary eye-witness accounts as any reliable historian would do. But no, Moldawa testified that he had not done so. Then, attempting to land on all fours, Sydnor claimed that the fact Moldawa performed no research at all didn't matter. Why?--because Moldawa's "capabilities and memory are substantial, if not extraordinary." Logically Sydnor used the only possible method. The book was written in 1979, thirty-five years late and Moldawa had no notes. Sydnor testified that Moldawa has an extraordinary memory. Sydnor alleged that he was aware of this memory as a consequence of his having met Moldawa only once. At this one meeting in the corridor outside the hearing room, they were in each others presence for about 1 minute. Were they alone for this one minute meeting? What language was used we do not know, Moldawa is a Pole who testified through an interpreter, Sydnor does not

understand polish. The linchpin falls. Both Sydnor's testimony and Moldawa's book are incredible.

But, then, how to effect the deportation? One wrongful method remained -- predetermination. If Gross Rosen is painted as a hell hole of evil and wanton brutality, then the fact that there is no evidence that those imprisoned were there because of race, religion, national origin, or political opinion may be ignored by the finder of fact and the courts of review.

To characterize Moldawa's testimony and book as pejorative borders on severe understatement. It is replete with reference to alleged wanton and unrestrained acts of cruelty,[11]

---

11 Moldawa testified at least ten prisoners were shot and killed on the spot each and every day at Gross Rosen inside the protective custody area of the camp by block leaders at roll call at the "hat's off" order. This alone would account for the deaths of 16,860 people between August 2, 1940 and March 16, 1945. But, the prodigious memory of Moldawa failed him in this instance. He utterly failed to so much as mention hat's off murders in his book. Every other prisoner witness failed to mention any such conduct. Nor is such conduct mentioned in the Ludwigsberg papers or Nuremberg Documents. In spite of such a glaring contradiction, Sydnor admits that Moldawa's book was the principal (continued on next page)

ending with a claim that 46,000 to 50,000 persons were murdered at Gross Rosen.[12] Punishments were allegedly carried out instanter and at the apparent whim of whatever underling happened to be handy. Naturally, the sick and infirm are frequently described as being murdered where they stood. But documents from the German war crimes investigating authority; the so-called Ludwigsberg files, show that the number of deaths were minuscule when compared with Moldawa's claims and, further, the deaths attributable to the period of time Mr. Kulle was stationed at Gross Rosen, all appear to have been the result of work accidents or

---

source material he used for his testimony about Gross Rosen.

12 A reading of the Moldawa book, demonstrates the ridiculous assumptions he indulged in in order to arrive at the number of "deaths." For instance, if a truck left the camp Moldawa merely determined the seating capacity and assumed that all inside would be killed ignoring transfers to other camps and transfers to one of the seventy subcamps of Gross Rosen distant from the main camp (Tr. 221).

formal execution procedures on account of criminal activity. The reliability of these documents is evidenced by their agreement with the evacuation figures of prisoners received as shown on the Buchenwald statistical compilation. This latter document is from the collection of the Nuremberg War Crimes trials documents.

The complicated procedure followed by the Gross Rosen camp staff prior to the infliction of corporal punishment in the case of a Russian prisoner who was caught attempting to escape is in sharp contrast to Moldawa's assertions of wanton infliction of beatings and the like.[13]

---

13 Apparently, Moldawa was not killed, as he claimed others were, because he was very ill at the time of the evacuation. On the contrary, he was eventually hospitalized and, after a few days, boxes containing his personal effects were duly delivered to him. This conduct is consistent with the proposition that Gross Rosen was a labor camp and the inmates were valuable to the war industries. The prisoners as well as all others in Germany were subject to the universal compulsory labor laws. The prisoners received pay that could be saved, or spent at their canteen. They received medical care, dental treatment and dental checkups. An order to the guards in force near the time Mr. Kulle first arrived at the camp required the prisoners' lives be preserved.

Yet, notwithstanding this, the expert, Sydnor, chose to rely primarily upon this "history" and in one unrestrained moment characterized it as a "classic." He did not think the book lacking in scholarship. He did not think it was pejorative or tendentious.

OSI went so far as to falsely accuse Kulle of wishing to be at the camp in order to work on the finder's prejudice.[14]

---

14 Sydnor himself testified in a pejorative manner, contrary to the apparently more scholarly approach he took when he wrote his own book. Comparing OSI statement that Kulle and the Division were "occupied with police and security measures against religious and political opponents of Nazi rule" and that wounded soldiers who were transferred to Gross Rosen were persons "who had no objections to performing camp service" with Sydnor's book where he wrote that but for a three day rest period the Division was fighting continuously; that its casualties were the highest of the entire army group; that its fighting abilities were held in high esteem; that from March 20, 1942, shortly after Kulle received his third and debilitating wound, it had suffered 12,625 casualties out of an original compliment of 17,265 men; and that no other division had received so many battle decorations in so short a time. Sydnor also wrote and gave citation to authority that wounded soldiers home on convalescent leave were being "grabbed" for concentration camp duty; that once at camp and recuperated they were not allowed to return to the Division, even to the extent of the denial of their requests for transfer. Sydnor's book described how an attempt to transfer out of the Division or to resign from SS service resulted in the soldier's incarceration in a concentration camp. In his book there is no hint that (continued on next page)

The trier of fact was presented with an "expert" whose apparent expertise did not include Gross Rosen until he was given a book to read and his job was merely to regurgitate it back in the form of "expert" testimony. This is truly as close as one can get to manufacturing a witness. Sydnor and the prosecution engaged in a shameless, sham episode that could only occur in the lax and unstructured atmosphere of a deportation hearing.[15]

Regarding the Moldawa assertion that 46,000 to 50,000 were murdered at Gross Rosen,

---

while Kulle was in the Division it was anything but a front line Division nor that wounded soldiers first had to have "no objections" to be "grabbed" for guard service. Kulle long before Sydnor's, book was available, stated that he had been "grabbed" for guard service and had risked making a request for a transfer back to front line duty rather than stand guard. His request for transfer was denied.

15 The Seventh Circuit said: "...there is a temptation to discredit Moldawa's contribution to the case which gives highly detailed information, such as long lists of prisoner numbers, without any aid other than memory." App A13. Sydnor's testimony depended upon Moldawa's book. The testimony of each is thereby discredited.

compare this claim to Sydnor's trial testimony in the Schellong case where the German concentration camp system was in issue and where he stated unequivocally that no systematic, large scale killings had occurred in the camps in Germany proper. Rather, such killings had occurred in the camps in the East, primarily in Poland. Gross Rosen was in Germany.

To rely upon the Moldawa book and the shameless, unhesitating reliance thereon by a manufactured expert should be taken as an affront to this Court and its processes. Such conduct by O.S.I. is of more evidentiary value concerning its own arrogance than the issue at hand. The evidence adduced at the hearing simply failed to clearly, convincingly and unequivocally establish that Gross Rosen was a place where persons were persecuted on account of race, religion, national origin or political belief. That being the case there was insufficient evidence upon which to base a finding that Kulle "assisted" in such persecution.

2.6 SUMMARY

There is no creditable evidence that Gross Rosen was a place of persecution where people were imprisoned because of race, religion, national origin, or political opinion. All witnesses who were there admit they were imprisoned for the commission of crimes. They fail to name one other prisoner incarcerated for relevant reasons. They admit there were few Jews in the camp. The Moldawa book is not past memory recorded, having been written thirty-five years too late. Sydnor's reliance upon it was misplaced. Sydnor's efforts to credit the book aborted. The finding that Gross Rosen was a place where individuals were imprisoned because of race, religion, national origin, or political opinion is due to a pernicious predetermination based upon prejudicial evidence and the admission of substantial inadmissible evidence, disregard of regulations, flawed procedures, the prejudice of the hearing officer

and her unwillingness to permit reasonable cross-examination and to consider impeachment and contradictions in the OSI evidence.

The regulations applicable to this deportation hearing state at 8 CFR 242.16: "... the respondent ... will have a reasonable opportunity to examine ... the evidence against him, ... and to cross-examine witnesses". This regulation is consonant with rudimentary requirements for a fair hearing by mandating a "reasonable opportunity" for cross-examination. Here there has been a substantial deviation from the prescribed procedures. "Compliance with the regulations was an essential safeguard of an alien's right to due process. Navia-Duran v. INS, 568 F.2d 803, 809 (1st Cir. 1977). See also, Duran v. INS, 756 F.2d 1338, 1342 (9th Cir. 1984).

In a case involving the history of an era of decades ago, where the OSI case depends upon such a large mass of materials, prior disclosure to the defense is absolutely necessary to afford

a reasonable opportunity for cross-examination. The OSI trial attorney had it within his power to supply such materials. He refused. The IJ had the discretion to order discovery. She refused. Prior to the hearing the defense requested the aid of the District Court. It refused. One subject to an immigration hearing is entitled to an opportunity to explain or refute the evidence. Chin Quong Mew ex rel. Chin Bark Keung v. Tillinghast, 30 F.2d 684 (1st Cir. 1929) Since Mr. Kulle's deportation under the Holtzman Amendment will permanently bar him from this county, the denial of a reasonable opportunity to refute the evidence casts grave doubt on the constitutional adequacy of deportation proceedings. Rose v. Woolwine, 344 F.2d 993 (4th Cir. 1965). See also, Maltez v. Nagle, 27 F.2d 835 (9th Cir. 1928); Gonzales v. Zurbrick, 45 F.2d 934 (6th Cir. 1930).

Jencks is applicable to immigration cases. Prior written statements by Lubash and

Kozlowski in the possession of the Immigration and Naturalization Service and directly relating to the witnesses' location and story of the time and place in issue were not produced. Their testimony was crucial and, in the end, relied upon. In Carlisle v. Rogers, 262 F.2d 19 (DC Cir. 1958), the court held the refusal to produce the pre-hearing statement of an important, relied upon witness was prejudicial error. Had OSI even claimed privilege, which it did not, the judge was required to hold an in camera inspection. Petrowicz v. Holland, 142 F SUPP 369 (1956).

Here the finder of fact did not "want" impeachment of OSI witnesses and found impeachment a waste of time. Impeachment was characterized as badgering the witness. The judge displayed her contempt for counsel by threatening 20 lashes -- there is a want of fair trial. There is a denial of a reasonable opportunity for cross-examination.

The hearing, due to its defects, led to a denial of justice. In this case, most of Kulle's objections were well founded; most the of government's objections were ill founded. The admission of a mass of incompetent evidence, the use of the device of "created" expert testimony, and the denial of reasonable cross-examination, inescapably leads to the conclusion that here there has been an overall denial of justice. "Suffice it to say, that, without the admission of this evidence [and the unfair procedures employed], it is, at least, highly uncertain whether the finding of the Special Inquiry Officer would have been made." Yiannopoulos v. Robinson, 247 F.2d 655, 657 (7th Cir. 1957). See, Bilokumsky v. Tod, 263 U.S. 149 (1923).

The "manufactured" expert testimony of Sydnor and the book of remembrances and speculations of Moldawa should not have been received into evidence. "... where evidence was

improperly received and where but for that evidence it is wholly speculative whether the requisite finding would have been made. Then there is a deportation without a fair hearing." Bridges v. Wixon, 326 U.S. 135, 156 (1945). There is a total lack of reasonable and substantial evidence that Gross Rosen was a place of persecution because of race, religion, national origin, or political opinion. The finding of clear and convincing evidence is in error as a matter of law. The order of deportation should be reversed.

CONCLUSION

For the foregoing reasons, petitioner, Reinhold Kulle, respectfully requests that a writ of certiorari issue to review the judgment of the court of appeals. In particular, this Court has granted the writ in the Kungys case now under review which involves the issue of materiality of misrepresentations. The decision of this Court

in Kungys may control the law of this case. It would be manifestly unfair to deport this Petitioner with the resultant loss of his earned social security benefits should the Seventh Circuit's decision be in error.

Charles W. Nixon
Counsel of Record and
Robert A. Korenkiewicz
Attorneys for Petitioner
29 S. La Salle Street
Chicago, Illinois 60603
(312)-782-7450

In the

United States Court of Appeals

For the Seventh Circuit

No. 86-1277

Reinhold Kulle,

Petitioner,

v.

Immigration and Naturalization Service,

Respondent.

Petition for Review of Order of the
Board of Immigration Appeals

Argued December 10, 1986-Decided August 5, 1987

Before COFFEY and EASTERBROOK, Circuit Judges, and GRANT. Senior District J··dge.*

---

*The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

GRANT, Senior District Judge. In a decision rendered on November 20, 1984, Immigration Judge Olga Springer ordered Reinhold Kulle deported to the Federal Republic of Germany under section 241(a)(19) of the Immigration and Nationality Act as amended. In its decision of December 10, 1985, the Board of Immigration Appeals ("Board") dismissed Kulle's appeal, agreeing with the judge that Kulle was deportable. He now appeals, and we affirm, the decision of the Board.

I.

Kulle was born in 1921, in the Breslau district of Silesia, once a part of Germany but now a part of Poland. He remains a citizen of Germany, although he was admitted to the United States for permanent residence on November 7, 1957. As a teenager, in 1940, Kulle joined the Waffen SS of the German military and served that notorious arm of the Nazi regime through May of 1945. The government's Order to Show Cause alleged that Kulle served with the Death's Head (Totenkopf) Division of the Waffen SS, which required his duty in France, Austria, the Soviet Union and throughout Nazi Germany. For his services, Kulle received the decoration of the Iron Cross Second Class. In August of 1942, Kulle was assigned to the Death's

Head Battalion at Gross-Rosen, a concentration camp in Kulle's native Silesia. During his nearly three-year tenure at Gross-Rosen, Kulle received a promotion to the rank of corporal and another to the rank of sergeant. He worked as a guard and as a training leader.

The Order to Show Cause further alleged that Kulle's position as a guard involved the armed guarding of Gross-Rosen prisoners under the strain of forced labor. As a training leader, Kulle instructed SS recruits in the use of the weapons. Most importantly, the Order to Show Cause alleged that during Kulle's term at Gross-Rosen the camp was a place for persecution of prisoners of the Nazi regime. The persecution included forcible internment and slave labor of prisoners for reasons of race, religion, national origin or political opinion. The Order also alleged that in January of 1945 Kulle participated in the forced evacuation of prisoners, via open freight cars, from Gross-Rosen to Mauthausen, an infamous concentration camp in Austria.

In the Order to Show Cause, the government asserted that Kulle was deportable because, as an instrument of the Nazi regime, he participated in the persecution of persons on account of their

race, religion, national origin or political opinion. The government also alleged deportability on the grounds that Kulle procured his immigrant visa by misrepresenting material facts, and that he therefore does not possess a valid visa. At the deportation hearing held on January 17, 1983, Kulle denied all charges of deportability. The immigration judge denied various motions, including Kulle's motions for discovery and jury trial. Kulle petitioned for, and was denied, a writ of mandamus to compel discovery. Kulle v. Springer, 566 F. Supp. 279 (N.D. Ill. 1983). Once the deportation hearing was reconvened, Judge Springer issued a forty-seven page decision declaring Kulle deportable on the basis of clear and convincing evidence indicating his participation in the prosecution of persons because of race, religion, political opinion or nationality. The government's evidence at the deportation hearing consisted of various documents, Kulle's statements made under oath in an interview held on August 14, 1982, and testimony from six witnesses. The witnesses included a German history professor, four survivors of Gross-Rosen, and a former Foreign Service Officer of the American Consulate in Frankfurt, Germany, where Kulle obtained his visa in September of 1957.

On appeal, the Board agreed that the evidence demonstrated Kulle's assistance in the persecution of persons because of their race, religion or political opinion. The Board also concluded that the record established additional charges of deportability because Kulle entered the United States by fraud and with an invalid immigrant visa. On this appeal Kulle contests the dual grounds for his deportation, and he also contends that he was not afforded a fair trial.

II.

Section 241(a)(19) of the Immigration and Nationality Act ("INA"), known as the "Holtzman Amendment," mandates deportation of any alien who:

> during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with
> (A) the Nazi government of Germany,
> (B) any government in any area occupied by the military forces of the Nazi government of Germany,
> (C) any government established with the assistance or cooperation of the Nazi government of Germany, or

(D) any government which was an ally of the Nazi government of Germany,

Ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

8 U.S.C. Sec. 1251(a)(19).

Kulle attacks the legislation on its face, arguing that the term "persecution" is unconstitutionally vague and overbroad, that the Holtzman Amendment, enacted in 1978, is an ex post facto law, and that it is a bill of attainder inflicting punishment without a judicial trial. These arguments must fail, however, as they did in our decision of Schellong v. Immigration and Naturalization Service, 805 F.2d 655 (7th Cir. 1986). As we explained in Schellong, the term "persecution" is adequately defined by legislative history and court interpretations, 805 F.2d at 662, and rather than punish individuals for actions previously taken, the Holtzman Amendment merely "ensure[s] that the United States is not a haven for individuals who assisted the Nazis in the brutal persecution and murder of millions of people." Id.

Kulle next argues that the evidence is not sufficiently clear and convincing to establish that Gross-Rosen was a place of persecution or that he

ever assisted in persecution. Kulle insists he never persecuted anybody. The government does not really attempt to make that argument, but relies instead on a theory which places Kulle in a camp of widespread persecution. But Kulle disagrees, arguing that the government "manufactured" expert testimony to fit its trial objective of depicting Gross-Rosen as a place of persecution. According to Kulle, the government pursued this course despite the fact that not one standard historical work on the Nazi era describes Gross-Rosen as a place of persecution, and the only reputable book mentioning Gross-Rosen states that it was a camp predominantly populated by criminals. Thus, in Kulle's view, the government had to rely on an inherently unreliable source, a book by Mieczyslow Moldawa entitled Gross-Rosen: A Concentration Camp in Silesia. Kulle's criticism of this source stems primarily from the author's method of compiling a very detailed description of the camp-a method which required no citation to authority, no prior note-taking or diary, and no research.

The government contests Kulle's view of the evidence and argues that its expert witness, Dr. Charles Sydnor, a professor in modern German history, testified that as of May 1, 1941, Gross-Rosen was established as an independent con-

centration camp. Prisoners worked in the nearby granite quarries. According to Sydnor, the prisoner population among Gross-Rosen and its many subcamps exceeded 10,000 by 1945, and it included persons of various nationalities and religions. Sydnor was adamant, however, that Gross-Rosen was not primarily a place for ordinary criminals but instead was a place for incarceration and severe treatment of disfavored religions and races (e.g., Jews and Slavs), and of political opponents of the Nazi regime. The different classifications of prisoners were identified by the patch: for example, political prisoners wore red patches and Jews wore the yellow Star of David. Kulle, in fact, admitted to knowing Jewish prisoners "through the patch."

The government also offered the testimony of four Polish prisoners who suffered at Gross-Rosen. All alleged to be imprisoned for political reasons during Kulle's term at Gross-Rosen, and all testified to the brutal conditions existing there. Moldawa testified that construction on a gas chamber at Gross-Rosen was started in 1944 but never completed. He related the cruel and arbitrary treatment of prisoners, including a punishment of death for arriving late to roll call. Marcel Lubasz testified that SS guards regularly

beat the prisoners and maintained constant surveillance over the forced labor at worksites. Ludwig Kozlowski related how, upon arrival at Gross-Rosen, SS guards beat and kicked prisoners embarking from trains. He recalled the mass execution of Russian prisoners during April of 19443. Marion Wojciechowski testified to the ritual of beatings delivered by SS guards. He claimed the Jews received the worst treatment. Judge Springer found that "all of the witnesses who testified were credible."

For his part, Kulle testified that he never served as a guard within the camp itself. His guard duties included a day shift along the perimeter of Gross-Rosen, a night shift in the watchtowers located outside the protective custody area, and some guarding of work groups engaged in digging and loading. "Kapos," or criminal prisoners, were the enforcers of the work groups. Kulle testified that the kapos, not the guards, punished the prisoners when they refused to work. Kulle insists he did not have authority to shoot prisoners attempting escape. As a corporal, Kulle began training recruits for combat, and upon becoming a sergeant, Kulle trained more and guarded less. He denied ever seeing a prisoner beaten or shot. He claimed he brought one

prisoner a chicken upon returning from leave, and he brought another prisoner water on the train to Mauthausen. Kulle insists he was merely a passenger, not a guard, on the trip to Mauthausen.

Schellong v. Immigration and Naturalization Service, 805 F.2d at 655, was a similar case, although Conrad Schellong served at Sachsenburg and Dachau-two well-known "death mills." In Schellong, we placed much reliance on the Supreme Court decision in Fedorenko v. United States, 449 U.S. 490 (1981), for direction on the issue of "persecution." Now Kulle argues that Fedorenko cannot control the decision in this case because Fedorenko was a denaturalization, not a deportation case; Fedorenko was admitted under the Displaced persons Act of 1948, which declares an alien ineligible for admission if he has engaged in activity "hostile to the United States"-a much lower standard than what is required in Kulle's case; crimes against humanity were not proven here and Kulle cannot be found culpable for what could only possibly amount to gross negligence; and Fedorenko involved much different facts. Kulle insists it should make a difference that Fedorenko served at Treblinka, a notorious death camp where the guards systematically killed their Jewish prisoners by treating them like animals. But our

decision in Schellong, a deportation case, teaches that none of these distinctions makes a difference. Because the statute authorizes deportation of anyone who "assisted" in persecution, personal involvement in atrocities need not be proven.

> [A]n individual who served as a guard has assisted in persecution for purposes of Section 1251(a)(19).... Nazi concentration camps were places of persecution; individuals who, armed with guns, held the prisoners captive and prodded them into forced labor with threats of death or capital punishment cannot deny that they aided the Nazis in their program of racial, political and religious oppression.

Schellong, 805 F.2d at 66.

Likewise, it is to no avail for Kulle to argue that, according to the international standards established at Nuremberg and other post-war trials, see, e.g., Josef Kramer and 44 others (Belsen Trial), United Nations War Crimes Commission (1945), the court cannot determine that he was active in persecution of prisoners merely because he was present. Kulle urges this Court to find that there must at least be some proof of actual knowledge or, or an opportunity to prevent, the wrongful acts of persecution before a court of law can declare that Kulle in fact participated or assisted in the persecution. This argument, however, fails on the

weight of its irrelevancy. This is a deportation case. The proof is directed toward showing presence at a place of persecution, and "assistance" in persecution is inferred from the circumstances. This is not a criminal proceeding, and the "punishment" is not hanging. The legal principles established at Nuremberg have contributed much to certain spheres of law and to the definition of "persecution." But they have no immediate bearing on a deportation proceeding controlled by a statutory provision which, for all intents and purposes, utilizes the term "assisted" in persecution quite liberally. See Massey, Individual Responsibility for Assisting the Nazis in Persecuting Civilians, 71 Minn. L. Rev. 97 (1986).

Moreover, at the root of the case against Kulle is the credit Judge Springer gave to the government witnesses. She found that

> all of the witnesses who testified were credible. None of them had an "axe to grind" as was alleged by [Kulle's] counsel in his reply brief. None of them identified [Kulle] as an SS man who they recognized from Gross-Rosen. They had nothing to gain by giving false testimony. Their testimony was based upon their own experiences at Gross-Rosen.

Op. at 28.

The Board interpreted the judge's decision to mean that Kulle lacked credibility. Perhaps that is the only inference to be drawn once the testimony of the other witnesses is considered truthful. But we need not speculate on Kulle's credibility, nor will we attempt to fully reassess the credibility of all the witnesses (though there is a temptation to discredit Moldawa's contribution to the case which gives highly detailed information, such as long lists of prisoner numbers, without any aid other than memory.) It is enough to conclude that Judge Springer's credibility choices present no inherent contradictions, and are supported by the weight of the evidence in the record and by what history instructs about the long reach of Nazi oppression. Kulle cannot now prevail on the basis of his attacks on witness credibility.

Finally, it makes no sense for Kulle to contend that Gross-Rosen was merely a camp of forced labor. We have said that incarcerations, forced labor, cruel and inhuman treatment, and arbitrary and severe punishment are sufficient to rise to the level of persecution. Schellong, 805 F.2d at 661. We need only recall the Nazis' decree that Jews, Gypsies, Russians, Ukrainians and Poles must suffer "extermination through work." Once the fact of forced labor is established, the remaining

proof is routinely satisfied. It seems clear to us that the tagging of prisoners along racial, national, or religious lines creates a strong presumption of persecution because of race, religion, national origin or political opinion. The fact that some prisoners were criminals does not rebut the presumption. We agree with the Board that, in terms of the Holtzman Amendment, substantial evidence indicates Kulle's assistance in persecution of prisoners on the basis of race, religion, national origin, or political opinion.

III.

Kulle argues that he received an unfair hearing before Judge Springer. The court denied Kulle discovery, and he responded with a mandamus suit. Relief was denied. Kulle contends the slow manner or lack of discovery hampered his ability to prepare a defense. For example, the Office of Special Investigations ("O.S.I.") tendered Moldawa's book only two days before it became evidence, and the judge denied discovery of the immigration papers of witnesses Kozlowski and Wojciechowski. Kulle argues these rulings denied him a fair hearing.

Kulle objects to the quantity of hearsay utilized by the government, and to the fact that Judge Springer permitted government attorneys to discuss testimony with witnesses during breaks in the trial. Kulle contends the government "protected" its witnesses by obstructing their cross-examination. Kulle attempted to impeach to show bias, but the court refused to allow this line of questioning. O.S.I. repeatedly objected to cross-examination.

Kulle contends the immigration court "prejudged" the government witnesses as credible. Kulle expends considerable effort in detailing how he sought to puncture holes in Moldawa's portrayal of Gross-Rosen, and how the judge found any cross-examination of Moldawa to be fruitless. Kulle also objects to Judge Springer's view that impeachment of witness Lubasz would be a waste of time. In pre-judging the credibility of witnesses, Kulle argues that the judge abrogated her role as finder of fact.

The government responds that there is no provision for discovery in deportation proceedings, and in any event, Kulle did in fact have knowledge and notice of much of O.S.I.'s case against him. The government contends that after the hearing was

adjourned for a month, Kulle could have recalled the government's witnesses as part of his case and examined them further. The government suggests that Kulle's failure to do so must be considered a waiver of his claim that he was allowed insufficient time to utilize materials voluntarily supplied by the government.

We cannot agree with Kulle's assessment of the hearing. We think, first, that the government established deportability by "clear, unequivocal, and convincing evidence." Woodby v. Immigration and Naturalization Service, 385 U.S. 2766 (1966). We are also impressed by Judge Springer's consideration of the testimony:

> I very carefully observed the demeanor of each witness as he testified during both direct and cross-examination, which in the case of one witness was especially lengthy and thorough. Each witness testified in a candid and forthright manner, and I find that all of the witnesses who testified were credible.

Op. at 28.

Finally, we believe the hearing was conducted in accordance with the provisions of 8 U.S.C. Sec. 1252 and 8 C.F.R. pt. 242 (1986). According to the rules governing deportation proceedings, the respondent has "a reasonable opportunity to

examine and object to the evidence against him, to present evidence in his own behalf and to cross-examine witnesses presented by the Government." 8 C.F.R.. Sec. 242.16 (emphasis supplied). There is no provision for general discovery, and the right to cross-examine is not unlimited. Given the opportunity for some cross-examination and the judge's statements concerning the credibility of witnesses, we conclude that Judge Springer acted within her discretion to deny further inquiry into the general background and testimony of witnesses.

IV

Section 212(a) of the INA excludes from entry:

> (19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact;
>
> (20) Except as otherwise specifically provided in this Act, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of

identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to Section 212(a).

8 U.S.C. Sec. 1182(a)(19), (20) (1970).

The Board concluded that Kulle entered the United States by fraud and with an invalid immigrant visa. We agree that, on the basis of the evidence presented, and because any alien who was excludable at the time of entry is deportable, 8 U.S.C. Sec. 1251(a)(1), Section 212(a), is an independent basis for deportability.

Kulle argues that he never lied about his wartime activities. At the deportation hearing, O.S.I. attorneys attempted to prove otherwise by introducing the tape recording of an interview held on August 14, 1982, the testimony of former Foreign Service Officer John Coffey and the testimony of retired Vice Consul Katherine Geoghegan. The O.S.I contends (1) the tape reveals that Kulle confessed to lying about his service in the SS because he thought it would bar him from obtaining a visa; (2) the testimony of Foreign Service Officer Coffey establishes that visa applicants at Frankfurt in 1957 were required to complete a German-language questionnaire which inquired into wartime military service; and (3) the testimony of Vice Consul Geoghegan, the signator of Kulle's

immigrant visa, demonstrates that Waffen SS guard service would disqualify a visa applicant at the American Consulate-General in Frankfurt.

Kulle contends that the Board failed to consider the full context of his statements made in the interview held in 1982. Kulle was interviewed by Bruce Einhorn of the O.S.I.:

> Q. Mr. Kulle, a moment ago off the record you indicated that there were some matters you wanted to explain.
>
> A. Yes.
>
> Q. Did you tell me specifically that you had lied on your immigration papers and that it is that fact which you would now like to explain?
>
> A. Yes.
>
> Q. By immigration papers, are you referring to the papers through which you filed for permission to come to the United States?
>
> A. Yes.
>
> Q. Mr. Kulle, I will give you every opportunity to explain in this way-I would first like you to indicate, so that the record is clear, on what subject precisely you lied. And you may then explain why you did it. So, first, please tell me about what did you lie?

A. I did not say that I was in the SS. I said that I was in the Army.

Q. Are you telling me this is what you told officials who were processing your visa application for the United States?

A. Yes.

Q. What else did you fail to reveal to those officials when asked?

A. I did not admit that I was with the SS. I did not say that I had been with the-that I had been transferred to the concentration camp Gross-Rosen, because that was all connected with the SS.

Q. Are you telling me that when asked to account for your background by those who were processing your United States visa application, you failed to give them truthful answers regarding your service in the SS and specifically at Gross-Rosen?

A. That's correct.

Q. Okay, was it your understanding at the time you made these lies, that if you had told the truth about your SS service you would have been denied admission to the United States?

A. That's correct.

* * *

Q. Would you tell me how you went about applying for this visa?

A. I can't say it exactly anymore.

Q. Let me see if I can help you. Did you have a discussion with any officials at the American Embassy, who asked you questions about yourself for the purposes of completing this application?

A. No.

Q. Did you speak English at the time you applied for admission to the United States?

A. I could not speak a single word of English.

Q. Then how did you complete this visa application? Were you assisted by anyone in the American Consulate who spoke German?

A. No, not to my knowledge. I can't remember.

Q. Mr. Kulle, do you dispute the information provided in your application for visa and in your immigrant Visa, which you have been shown here today?

A. Yes, the information is correct.

Q. Didn't you tell me that you lied to gain admission to the United States?

A. Yes, I said that.

Q. When and to whom did you lie?

A. I think I lied to the American Government. And I feel sorry, sorry about this. There is not interview; I did not lie in an interview. Where I lied on the application for visa.

I have lied in the sense that I did not reveal that I was in the SS, and so forth.

Q. Are you saying that to the extent this document is inaccurate, this document, Exhibit 11?

A. Yes.

Q. Have you ever been interviewed by the Immigration and Naturalization Service of the United States Government?

A. No, never.

Kulle argues that he "lied" only in the sense that he did not reveal his membership in the SS, a piece of information not requested by the visa application. Kulle insists he never intended to conceal the fact of residence at Gross-Rosen. His marriage certificate, for example, attached to the visa application, shows that he was married at Gross-Rosen in August of 1944. Moreover, consulate officials did not hold a meeting to inquire about his wartime activities. Kulle suggests, therefore, he made reference to lying merely as a result of his incomplete understanding of English, his second language.

The government argues that the hearing demonstrates Kulle lied on his immigration papers by claiming that he had spent World War II in the German Army rather than the SS, because he believed his SS service would bar him from obtaining a visa. We agree. We also agree with the government that the misrepresentation concerned a "material" fact, Kulle's service at Gross-Rosen, insofar as it closed off a relevant line of inquiry which could designate him excludable. Ms. Geoghegan testified that service in the Waffen SS was a significant factor in the visa process. She claimed she would have denied an immigrant visa to any former SS member who had guarded concentration camp prisoners. We agree with the Board that Kulle's misrepresentation was "material." See United States v. One Lear Jet Aircraft, 808 F.2d 765, 773 (11th Cir. 1987) (area of "potential significance"); Kungys v. United States, 793 F.2d 516 (3d Cir. 1986) (Certiorari granted to explore "material" under 8 U.S.C. Sec. 1451(a)).

For the reasons discussed above, the decision of the Board of Immigration Appeals is affirmed.

Affirmed

A true Copy:
Teste:

-- B1 --

United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, Virginia 22041

File: A10 857 195 - Chicago

In re: REINHOLD KULLE

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Charles W. Nixon, Esquire
29 South LaSalle Street, Suite 340
Chicago, Illinois 60603

ON BEHALF OF SERVICE:

Bruce J. Einhorn
Ronnie L. Edelman
General Attorneys
Office of Special Investigations
Criminal Division
U.S. Department of Justice

ORAL ARGUMENT: April 22, 1985

CHARGES:

Order:

Sec. 241(a)(1), I&N Act [8 U.S.C. Sec. 1251(a) (1)] - Excludable at entry under section 212(a)(19), I&N Act [8 U.S..C. Sec.

1182(a) (19)] - Procured visa by fraud or willful misrepresentation of a material fact

Sec. 241(a) (1), I&N Act [8 U.S.C. Sec. 1251(a) (1)] - Excludable at entry under section 212(a) (20), I&N Act [8 U.S.C. Sec. 1182(a) (20)] - No valid immigrant visa

Sec. 241(a) (2), I&N Act [8 U.S.C. Sec. 1251(a) (2)] - In the United States in violation of section 212(a) (19), I&N Act [8 U.S.C. Sec. 1182(a) (19)] - Procured visa by fraud of willful misrepresentation of a material fact

Sec. 241(a) (2), I&N Act [8 U.S.C. Sec. 1251(a) (2)] - In the United States in violation of section 212(a) (20), I&N Act [8 U.S.C. Sec. 1182(a) (20)] - No valid immigrant visa

Sec. 241(a) (19), I&N Act [8 U.S.C. Sec. 1251(a) (19)] - Participation in Nazi persecution

APPLICATION: Termination of proceedings; suspension of deportation; waiver of deportability under section 241(f) (1)

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

The respondent appeals from the immigration judge's decision of November 20, 1984, finding the respondent deportable as charged and denying him relief from deportation. The appeal will be dismissed after a minor modification of the immigration judge's decision.

PROCEDURAL OVERVIEW

The respondent is a 63-year-old native of the Breslaw district of Silesia, which, at his birth, was a part of Germany and is now a part of Poland (Exhs. 27, 30, 30(a), 32, 32(a)). He is still a citizen of Germany and was admitted to the United States for lawful permanent residence on November 7, 1957. On December 3, 1982, the respondent was served with an Order to Show Cause and Notice of hearing ((Form I-221), which alleged that he was deportable under sections 241(a) (1), (2), and (199) of the Immigration and Nationality Act, 8 U.S.C. Secs. 1251(a) (11), (2), and (19) (1982).

At his deportation hearing, which commenced on January 17, 1983, the respondent admitted, in substance, 12 of the Government's 18 allegations of

fact in the Order to Show Cause but denied all charges of deportability. He also filed motions to terminate the deportation proceedings and various other motions, including a motion for discovery, all of which were denied. In addition, the respondent demanded a trial by jury, which was also denied by the immigration judge. He then sought a writ of mandamus in the United States District Court for the Northern District of Illinois, Eastern Division, seeking to force the immigration judge to compel discovery in these deportation proceedings. Consequently, the deportation proceedings were stayed until July 19, 1983, pending a resolution of this writ. The petition for the writ of mandamus was dismissed by the district court on June 23, 1983. Kulle v. Springer, 566 Supp. 279 (N.D. Ill. 1983).

The deportation hearing reconvened on August 10, 1983, following several continuances granted at the respondent's request. On August 23, 1983, the respondent's hearing was adjourned, again at the respondent's request. The hearing finally reconvened on September 17, 1983, and the Government completed its case on September 22, 1983. The hearing was again recessed at the respondent's request until November 15, 1983, when the respondent began his case. The hearing

was finally closed on November 116, 1983, when the respondent finished presenting his case. After reviewing the 2,971 pages of transcript of the testimony and the copious documentary evidence presented, the immigration judge rendered her 47-page decision on November 20, 1984.

In her decision the immigration judge focused solely on the charge of deportability pursuant to section 241(a) (19) of the Act. She noted that the factual evidence presented related principally to the allegations regarding the respondent's assistance and participation in persecution because of race, religion, nationality, or political opinion. Five of the Government's six witnesses testified solely on this aspect of the case. The immigration judge found the testimony of these witnesses to be credible. thus, she concluded that the respondent had "assisted and otherwise participated in the persecution of persons because of race, religion, political opinion, or nationality" and was, therefore, deportable under section 241(a) (19) of the Act by evidence which is clear, unequivocal, and convincing, as required by Woodby v. INS, 385 U.S. 276 (1966), and 8 C.F.R. Sec. 242.14(a) (1984). Since this finding was dispositive of the issues of deportability and relief from deportation, the immigration judge's decision was

based on this conclusion alone. The respondent appealed.

ALLEGATIONS OF DEPORTABILITY

The Order to Show Cause alleged that on June 20, 1940, the respondent had joined the Waffen SS, an organization under the direction of, or in association with, the Nazi government of Germany. He served in the Waffen Ss until approximately May 1945 when the Second World War (WWII) ended. During the period that the respondent was a member of the Waffen SS, he served in its Death's head Division (Totenkopf Division). His service with the Ss death's Head Division took place in Germany, France, the Soviet Union, and Austria, and for his services, he received the iron Cross Second Class.

In August 1942 the respondent was assigned to the SS Death's head Battalion at Gross-Rosen concentration camp in his native Silesia and remained there until approximately January 1945. During the time he served in the Ss Death's Head Battalion at Gross-Rosen concentration camp, he received two promotions: one to the rank of corporation (rottenfuehrer) in October 1942, and another to sergeant (unterscharfuehrer) in ap-

proximately September 19443. Among his alleged activities while serving at Gross0Rosen was work as a guard and guard training leader. His work as a guard included the armed guarding of Gross-Rosen prisoners when they were sent to do forced labor. The respondent allegedly served often as group leader of SS guards and was a training supervisor of SS recruits, instructing them in the use of weapons.

The Order to Show Cause further alleges that at that time of the respondent's service the Gross-Rosen concentration camp was a place for persecution of prisoners of the Nazi government of Germany. This persecution included the forcible internment and slave labor of prisoners for reasons of race, religion, national origin, or political opinion. According to the Order to Show Cause, the respondent allegedly ordered, incited, assisted, or otherwise participated in the persecution of the Gross-Rosen concentration camp prisoners, actions which would render him deportable under section 241(a) (19) of the Act.

It is also alleged that in approximately January 1945, while still a sergeant in the Waffen SS, the respondent participated in the forced evacuation of prisoners by train from the Gross-

Rosen concentration camp to the Mauthausen concentration camp in Austria. This evacuation, which was conducted in open freight cars, allegedly resulted in the persecution of the evacuated prisoners and thus constitute another basis for the charge of deportability under section 241(a) (19) of the Act.

When the respondent applied for admission into the United States in 1957, he stated to immigration authorities that during WWII he had served in the German Army rather than in the Waffen SS. The order to Show Cause therefore alleges that the respondent misrepresented material facts regarding his membership and activities in the Waffen SS when he was seeking admission to this country. This allegation, if true, would support a finding that the respondent is deportable for having entered the united States by fraud and with an invalid visa. See sections 212(a) (19) and (20), and sections 241(a) (1) and (2) of the Act.

THE RESPONDENT'S CONTENTIONS

The case presented by the Government at the respondent's deportation hearing consisted of admissions made by the respondent under oath in

a transcribed interview on August 14, 1982; captured SS documents which the respondent executed during WWII; the testimony of six witnesses; and additional documentary evidence. The witnesses included an historical expert, four eye-witness survivors of the Gross-Rosen concentration camp, and a retired Foreign Service Officer who supervised the issuance of immigrant visas at the American Consulate in Frankfurt, Germany, at the time the respondent obtained his visa to enter the United States in September 1957.

The respondent contends that the Government failed to present clear, unequivocal, and convincing evidence that Gross-Rosen was a place where persecution due to race, religion, nationality, or political opinion occurred. He argues that inmates of the Gross-Rosen concentration camp were either criminals or prisoners of war and that the camp was not a place of persecution or extermination. He further claims that the punishment meted out to the prisoners upon their arrival at Gross-Rosen was not persecution. Characterizing Gross-Rosen as a labor camp where prisoners engaged only in forced labor, he distinguishes it from "death camps" like Auschwitz or Treblinka. He also contends that the prisoners of Gross-Rosen were of many nationalities, political beliefs, and religions and that no group

was singled out for persecution. Lastly, he alleges that the testimony of the Government's five witnesses was not credible.

Alternatively, the respondent claims that his service at Gross-Rosen was involuntary because he was involuntarily transferred to Gross-Rosen and his application for a transfer from Gross-Rosen was denied. the respondent denies that he was ever inside the protective custody area of the Gross-Rosen concentration camp and contends that he did not know what transpired inside. He also denies that he ever abused, shot, or killed any person in Gross-Rosen. Finally, the respondent raises constitutional arguments against the immigration judge's deportation order.

THE GOVERNMENT'S EXPERT WITNESS

Dr. Charles W. Sydnor, a historian of Nazi Germany, the SS, and the concentration camp system, was the Government's first witness at the respondent's deportation proceeding.(1) He

---

1/ Dr. Sydnor is a former professor of German history, specializing in the Nazi era, and author of the book, Soldiers of Destruction, a history of the SS Death's Head Division (Exh. 42). C. Sydnor, Jr., Soldiers of Destruction, The SS Death's Head Division, 1933-1945 (1977).

testified that between 1933 and 1945 the government of Germany implemented the racial policies of National Socialist Party and its leader, Adolf Hitler. The party created a racial hierarchy in which groups such as the Slavs, Great Russians, While Russians, and Jews were labeled inferior. The SS rounded up those politically opposed to the party's position and interned them in what became known as concentration camps. The SS later used these camps as places for the wartime exploitation and extermination of Jews, Slavs, Gypsies, Communists, Soviet prisoners of war, and other captive nationalities and political groups.

According to Dr. Sydnor, the internment center at Dachau, Germany, became a model for other concentration camps, including Gross-Rosen. Heinrich Himmler, the Ss chief, molded the Dachau model into a permanent concentration camp staffed with a cadre of Death's head guards. Dachau's commandant in June 1933 was Theodor Eicke, the founder of the Death's Head units. From those units, SS guards for other concentration camps, including Gross-Rosen, were recruited. The Ss at Dachau established precedents for the operation of all Nazi concentration camps, including brutal methods of punishment and slave labor. A system of disciplining prisoners similar to that at Dachau

was adopted at Gross-Rosen. Slave labor at places such as dachau and Gross-Rosen was conducted both inside and outside the camps in work gangs.

The SS guards in Death's Head units were distinguishable from other uniformed Nazis by their insignia of a skull and crossbones (Death's Head)) worn on the collar tab of the right side of the uniform. The indoctrination of SS guards emphasized hatred of the National Socialist Party's enemies which included the Jews, freemasons, Bolsheviks, and the churches. See C. Sydnor, Jr., supra, note 1 at 28. With the onset of WWII, the Death's Head units became known as the Death's Head Division. Id. at 37.

Dr. Sydnor also testified that in the summer of 199440 the Gross-Rosen concentration camp was a labor camp that was a subdivision of the Sachsenhausen concentration camp (Tr. vol. II at 208). On May 1, 1941, the Gross-Rosen concentration camp became an independent concentration camp with its own commandant and administration and was subordinated directly to the inspector of concentration camps (Tr. vol. II at 209).

Following the German invasion of the Soviet union, members of the Death's head Division were regularly transferred from the Eastern Front to SS guard units at concentration camps to assist in exterminating captive racial, religious, national, and political groups. Among those transferred to guard duty at the camps, including Gross-Rosen, were SS men wounded in action and volunteers from the Death's Head Division. Gross-Rosen was located in Silesia, which was near large veins of granite and other hard, heavy stone materials that were needed for building projects. The extraction of stones from these quarries was the primary reason for prisoner labor at the concentration camp. Gross-Rosen continually expanded during WWII, eventually numbering approximately 70 subcamps. As the subcamps proliferated, the main camp at Gross-Rosen continued to grow, expanding to tens of thousands of prisoners by 1945.

The classification of prisoners at Gross-Rosen was reflected on their clothing. Prisoners were issued distinctive uniforms, usually striped, that would make the uniforms easily identifiable if the prisoner tried to escape. Each prisoner also had a distinctive triangular patch of colored cloth sewn on his uniform. Political prisoners wore red patches; those judged to be asocials, a black

patch; professional criminals, a green patch; and homosexuals, a pink patch. Before the war Jews had been required to wear a yellow triangular patch. During the war the single yellow patch was replaced by two overlapping triangular patches that formed a Star of David.

The professional criminals, most of whom were Germans, ran a sort of trusty prisoner administration of the camp. They regularly served as kapos or as senior prisoner leaders who were responsible to SS men for the performance of work duties. Placed below the professional criminals were the asocials, who were treated a little more severely. Political prisoners were routinely treated very harshly. Jehovah's Witnesses were similarly treated since they were regarded as especially dangerous religious fanatics. Finally, the Jews received the worst treatment of any of the inmates (Tr. vol. II at 250-52).

Dr. Sydnor testified that the Gross-Rosen prisoners' day normally began at 5:00 a.m. in the summertime and at 6:00 a.m. in the winter. After breakfast the prisoners were assembled outside their barracks at the Appellplatz for a lengthy roll-call (appell). At the completion of this appell the prisoners were ordered to march in quickstep into

work companies (commandos) for labor outside the main camp that was guarded by members of the SS Death's Head Battalion (Tr. vol. II at 254-57, 262). They then labored until 6:00 or 7:00 in the evening. At noon there was a second roll-call, and a third appell took place at night, during which time prisoners who had violated camp rules were punished. The prisoners would then eat soup, clean their barracks, and go to bed (Tr. vol. II at 262-64).

The Death's Head Battalion members also guarded the prisoners from watchtowers and at wire perimeters around the camp (Tr. vol. II at 265). Dr. Sydnor testified that many abuses were committed by SS guards at the worksites outside the main camp. He told of how guards killed prisoners by beating them or forcing them back to work after they had collapsed from exhaustion. SS guards "shot without warning" any unarmed prisoner trying to escape a worksite and were rewarded with special leave for shooting prisoners (Tr. vol. II at 267-68). The SS guards were themselves supervised at worksites by guard leaders. These were men experienced in the use of firearms who preferably had experience in active combat, especially in Russia. The guard leaders also trained incoming SS recruits (Tr. vol. II at 269-70).

According to the witness, the SS Death's Head Battalion also assisted in the execution of many unarmed Allied prisoners of war between 1942 and 1945 (Tr. vol. II at 286-87, 532). The battalion was officially commended by the SS l3adership for shooting to death captured Soviet soldiers at Gross-Rosen (Tr. vol. II at 287, 532). Members of the battalion also took part in the hanging and execution by lethal injection of many prisoners inside Gross-Rosen (Tr. vol. II at 279-87, 532).

Gross-Rosen was later employed as a repository for prisoners, sent from concentration camps to the east, who were transferred before the arrival of Soviet armed forces (Tr. vol. III at 536-538). Dr. Sydnor testified that in late 19443 and 1944 some 10,000 prisoners from Auschwitz were taken to Gross-Rosen (Tr. vol. III at 539). Many of those prisoners were killed at Gross-Rosen by the SS prior to that camp's evacuation early during the winter of 1945 in order to prevent their liberation from the advancing Russian armies. Among the places to which prisoners from Gross-Rosen were evacuated was the Mauthausen concentration camp in Austria (Tr. vol. II at 290-91).

THE GOVERNMENT'S EYEWITNESSES

The Government also presented the testimony of four eyewitnesses who were confined in the Gross-Rosen concentration camp during the time the respondent was a guard there. The first eyewitness was Professor Mieczyslaw Moldawa, currently a professor of architecture at the Technical University in Lublin, Poland, who was born in Poland in 1923.[2] He testified that prior to the Nazi invasion of Poland he was a student and a member of a Social Democratic youth organization in Poland known as the Red Scouts (Tr. vol. IV at 598-99). Following the onset of the Nazi occupation of Poland in September 1939, he secretly brought medicine into the Jewish ghetto in Lodz. He was arrested in May 1940 by members of the German Secret State Police because he had written a letter to his father in which he described a speech by Winston Churchill which he had secretly heard over

---

2/ Professor Moldawa was also the author of the book Gross-Rosen: A Concentration Camp in Silesia (1979), which was admitted into evidence during Dr. Sydnor's testimony (Exhs. 444 and 44(a)). Also admitted into evidence by the immigration judge was a diagram of the Gross-Rosen concentration camp (Exh. 444(b)), which was enlarged and taken from that book (Tr. vol. II at 233).

the radio on the British Broadcasting Company (BBC). Following his arrest, he was incarcerated in several jails in Austria and Germany. In May 1941 he was transferred to the Dachau concentration camp and in June 1941, along with some 260 inmates of various nationalities, was taken by train from Dachau to Gross-Rosen (Tr. vol. IV at 609-19).

Professor Moldawa testified that the prisoners arrived at the Gross-Rosen train station at night, but the railroad car door was not opened until the following morning. Then, guards in green uniforms with the Totenkopf, or Death's head insignia, on their shoulders marched the prisoners from the train station up a hill to the main camp, beating them along the way (Tr. vol. IV at 620-621). Once inside the camp property, the prisoners were taken to a receiving barracks and made to undress for delousing and a complete body shaving. Each prisoner was then assigned a number, which he wore on his uniform. In addition, each prisoner received a patch on the shirt of his uniform, which denoted his category of confinement. Dr. Moldawa wore a red patch, an upside-down triangle with the letter "P" which denoted that he was a Polish political prisoner (Tr. vol. IV at 624). the prisoners were then made to exercise for 4 hours although they had not eaten for 2 days since leaving Dachau.

Professor Moldawa also testified that for the 3-1/2 years of his incarceration at Gross-Rosen he labored in the construction bureau of the SS. He worked as a draftsman, both in and out of doors, and thus had many opportunities to witness the growth of Gross-Rosen and the activities of the prisoners and the guards. Professor Moldawa also testified that he recalled seeing Jewish prisoners, including women, arrive at Gross-Rosen from Auschwitz in both 1944 and January 1945. Prisoners arriving from Auschwitz wee made to sleep on the bare floors of partly constructed stable barracks, which were later called by the Polish name for Auschwitz, "Oswiecim" (Exh. 44(a) at 30). Construction of a gas chamber at Gross-Rosen was begun in the summer of 1944 (Exh. 44(a) at 43), but was not completed because of a shortage of bricks (Tr. vol. IV at 747). Professor Moldawa's description of the typical day at Gross-Rosen was consistent with the previous testimony of Dr. Sydnor. He recounted many instances of beatings and death at the guards' hands, as well as other abuses (Tr. vol. IV at 637-38, 674-96). He also described a similar ranking of camp prisoners on the basis of political opinion and racial group, as well as the sufferings the prisoners endured as a result of their forced evacuation from Gross-Rosen to Mauthausen.

The next witness at the respondent's deportation hearing was Marcel Lubasz, a jew born in Poland in 1922 and currently residing in Tel Aviv, Israel, where he is a professional surveyor, engineer, and archaeologist. He testified that in the fall of 1942 he was sent by the Nazis to a labor camp, which turned out to be a death camp. He escaped from Nazi custody in 1943, but was recaptured and sent to Gross-Rosen in February 1944, where he remained until January 1945. He was classified as a Polish political prisoner by concealing his Jewish identity and began slave work as a digger along with about 100 other prisoners. Following his construction work, he was assigned to make rifle straps, and was later assigned to work as a technical draftsman in an electronics laboratory. He also gave testimony about beatings and executions similar to that of the prior witnesses regarding conditions at Gross-Rosen.

The next eyewitness was Ludwig Kozlowski, who was born in Poland in 1923, came to the United States in 1953, and is now a United States citizen. He testified that his mother was executed by the Germans because she was accused of being a Jew. He was told by the German authorities that he had to go to work in Germany, where he was

assigned to work at a farm in Brunau, Silesia. Although he did not volunteer for this work, he soon became a forced laborer for a period of several months. During this period, he met other Poles engaged in involuntary farm labor for the Germans. In July 19440 he and a friend escaped by train to Frankfurt where they wee apprehended n the street by a German policeman who noticed that they were not wearing an initial "P" which denoted "Pole". Following their arrest, they were taken to Straftlager, Germany for forced labor and remained there for 3 months and then were returned to the same Silesian farm as forced laborers. Mr. Kozlowski and his friend then attempted a second escape and after being arrested, they were eventually taken to Gross-Rosen, along with many other prisoners.

Mr. Kozlowski gave similar testimony as to the arrival of prisoners at Gross-Rosen (Tr. vol. IX at 1556-58). He was dressed in a white uniform with blue stripes with a red triangle upside-down in which there was a letter "P," indicating that he was a Polish political prisoner. He was assigned to labor in forced diggings and carrying of pipes and other equipment in the Canal Construction commando until he contracted an eye disease which resulted in his temporary blindness in 1943.

He was transferred by train in the summer of 1943 from Gross-Rosen to Buchenwald concentration camp, where he remained until the end of the war. His testimony as to the hangings, beatings, and other abuses at Gross-Rosen was similar to that of the previous witnesses (Tr. vol. IX at 1558-79). He also testified as to mass executions of Russian prisoners of war at Gross-Rosen by the SS during April 1943 (Tr. vol. IX at 1580-85). Mr. Kozlowski testified that the treatment of prisoners at Gross-Rosen was so harsh and cruel that when he and the other transferees arrived at Buchenwald concentration camp in the summer of 19443, they called it "Canada" by comparison (Tr. vol. X at 1747-48).

The final Government eyewitness at the respondent's hearing was Marion Wojciechowski who was born in Poland in 1914, arrived in the United States in 1950, and became a United States citizen in 1957. Prior to World War II, he attended a Polish military academy and had received an army officer's commission in 1938. During the Nazi invasion of Poland in 1939, he was wounded in action against German forces. Following Poland's surrender, he worked as an agricultural inspector. He also participated in the underground activities of the Polish resistance movement until he was

arrested on April 24, 1942. He was jailed at Radom with 20 other political prisoners, all of whom were Poles and ethnic Germans. In July 1942, he was brought to the Auschwitz concentration camp, where he was engaged in slave labor. He remained at Auschwitz until March 1943, when he was taken to Gross-Rosen concentration camp together with over 1,000 other prisoners, most of them Polish. His testimony as to the arrival, procedures, uniforms, and abuses of prisoners at Gross-Rosen was similar to that given by the other witnesses.

THE RESPONDENT'S TESTIMONY

The respondent testified that in June 1940, at the age of 19, he joined the Waffen SS with a government promise that upon completion of his enlistment he would obtain a civil service job or a farm (Tr. vol. XV at 2680-81). He was assigned to the Death's Head Totenkopf Division of the Waffen SS after he received 5 weeks combat training at Radolfzell, Germany, and at other camps.

The respondent also testified that he was wounded three times at the Eastern Front and received three military decorations. After his last injury in February 1942, he was deemed unfit for combat duty and was eventually transferred to

Gross-Rosen in September 1942 where he was ordered to guard prisoners (Tr. vol. XV at 2707, 2710). He claims that the guard company to which he was assigned was attached to the Gross-Rosen complex, but that he was not assigned to duty within the camp itself and never served within the camp complex. The respondent testified that his first assignment was to guard the perimeter of the Gross-Rosen complex to ensure that prisoners did not escape from the area that he guarded (Tr. vol. XV at 2712-15). He was also assigned tour duty at night in the watchtowers located outside the perimeter of the protective custody area, according to his testimony (Tr. vol. XV at 2716). In addition, he was assigned to guard groups of prisoners forced to work outside of the Gross-Rosen concentration camp by leading them to their worksite, and guarding them while they worked. This took place at the sandpits, loading area of the train station, and the quarry itself. The respondent was armed throughout the time he guarded these prisoners (Tr. vol. XV at 2716-24).

In September or October of 1942, the respondent was promoted to the rank of corporal (rottenfuehrer) and was assigned to train recruits in combat training and the use of weapons, allegedly spending 75 percent of his time training recruits

and 25 percent of his time on guard duty (Tr. vol. XV at 2730). In September 1943, he was promoted to sergeant (unterscharfuehrer) and spent most of his time training recruits (Tr. vol. XV at 2733). He asserted that he did not know why certain persons were in the protective custody of the Gross-Rosen camp (Tr. vol. XV at 2753). He also denied any knowledge of what went on inside the protective custody area of the camp and denied that he himself was ever within the protective custody portion of the camp. He specifically denied that he ever saw a prisoner beaten at the Gross-Rosen complex and denied that he ever saw a prisoner shot or mistreated (Tr. vol. XV at 2758). The respondent testified that in 1943 he had personal contact with a prisoner when the prisoner was working in the SS barracks, and that he brought the man a chicken when the respondent returned from leave (Tr. vol. XV at 2764). He testified that, as a guard, he had to follow regulations regarding the prisoners he guarded, and that he always followed those regulations. He specifically denied that he ever struck, shot, killed, or even shot in the direction of a prisoner, or that he ever mistreated a prisoner (Tr. vol. XV at 2773).

The respondent contends that he had applied for a transfer to the front during the course of his

duty at Gross-Rosen and that it was denied because he was unfit for duty (Trv. vol. XV at 2752-53). However, he later denied applying for such a transfer while at Gross-Rosen (Tr. vol. XV at 2814).

The respondent also denied participating in the evacuation of prisoners from Gross-Rosen, despite admitting that he was on the same train as the prisoners being evacuated. He testified that he was in a separate car, did not guard prisoners, and was merely traveling to a new duty site in Austria to which he had been transferred. He stated that, during the trip from Gross-Rosen to Mauthausen, the prisoners were guarded by Ukrainians and about 50 or 60 men from his guard company (Tr vol. XV at 2777). He was supposedly transferred to Austria where he was to train a company of combat troops. He testified that he traveled in a train car with six mother men, including his company commander, that the train stopped at Buchenwald, and that from Buchenwald the train went to Mauthausen (Tr. vol. XV at 2779-80). The respondent further testified that, after leaving the train station at Mauthausen, he walked to his new duty station at Au An Der Donau which was 8 kilometers away. His only contact with a prisoner throughout the train journey was to offer prisoners some water (Exh. 27) (Tr. vol. XV at 27744-83).

FINDING OF DEPORTABILITY UNDER SECTION 241(a) (19)

After reviewing the extensive record before us, we agree with the immigration judge that it reflects clear, unequivocal, and convincing evidence of the respondent's deportability under section 241(a) (19) of the Act as required by Woodby v. INS, 385 U.S. 276 (1966), and 8 C.F.R. Sec. 242.14(a) (1984). Section 241(a) (19) provides for the deportation of aliens who -

> during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with -
>
> (A) the Nazi government of Germany,
>
> (B) any government in any area occupied by the military forces of the Nazi government of Germany,
>
> (C) any government established with the assistance or cooperation of the Nazi government of Germany, or
>
> (D) any government which was an ally of the Nazi government of Germany,
>
> ordered, incited, assisted, or otherwise participated in the persecution of any person

because of race, religion, national origin, or political opinion.

The fact that the respondent's activities for the Nazi SS took place from 1940 to 1945 establishes that they fall within the period of time specified by section 241(a) (19) of the Act. Therefore, the elements of that section which are at issue are whether the respondent: (1) "assisted, or otherwise participated in the p[ersecution of any person" (2) "because of race, religion, . . . or political opinion," (3) "under the direction of, or in association with" the Nazi government of Germany.

(1) "Assisted or otherwise participated in the persecution of any person."

The term "persecution" as used in section 241(a) (19) of the Act contemplates the infliction of suffering or harm, under government sanction, upon persons who differ from others in the ways specified by the Act, i.e., race, religion, national origin, or political opinion. Matter of Fedorenko, Interim Decision 2963 (BIA 1984); Matter of Laipenieks, 18 I&N Dec. 4433 (BIA 1983), rev'd on other grounds, Laipenieks v. INS, 750 F.2d 1427 (9th Cir. 1985). The harm or suffering inflicted may take various forms, but it most certainly includes

physical confinement. Matter of Fedorenko, supra; Matter of Laipenieks, supra. The evidence presented clearly establishes that thousands of persons were confined at the Gross-Rosen concentration camp while the respondent served there. Most of those imprisoned were political prisoners, Jehovah's Witnesses, Protestant and Catholic clergy, Jews, and other opponents of the Nazi regime. The imprisonment of these inmates at the Gross-Rosen concentration camp clearly constituted "persecution" of them within the meaning of section 241(a) (19). Matter of Fedorenko, supra; Matter of Laipenieks, supra.

The respondent argues that the persecution element of section 241(a) (19) of the Act was not sufficiently established because there was no specific evidence of persecution by the respondent against the prisoners at Gross-Rosen or that, as a prison guard, he engaged in acts of brutality against them. We reject this claim.

The witnesses related many examples of the physical abuse and the poor and oppressive living conditions at the Gross-Rosen concentration camp during the time the respondent served there. The immigration judge found the testimony of the witnesses to be credible and found the

respondent's own testimony to lack credibility. An immigration judge's findings regarding the credibility of witnesses is ordinarily given significant deference since he is best able to observe their demeanor. Matter of Boromand, 17 I&N Dec. 450 (BIA 1980); Matter of Teng, 15 I&N DEc. 516 (BIA 1975); Matter of S-, 8 I&N Dec. 574 (BIA 1960); Matter of T-, 7 I&N Dec. 417 (BIA 1957). Because he is in the best position to determine the accuracy, reliability, and truthfulness of the testimony he hears, the immigration judge's factual findings ordinarily will not be disturbed. Vasquez-Mondragon v. INS, 560 F.2d 1225, 1226 (5th Cir. 1977); Kokkinin v. District Director, 429 F.2d 938 (2d Cir. 1970); Espinoza-Ojeda v. INS, 419 F.2d 183 (9th Cir. 1969); Volianitis v. INS, 352 F.2d 766 (9th Cir. 1965); Hamedeh v. INS, 343 F.2d 530 (7th Cir.), cert. denied, 382 U.S. 83 (1965); Matter of Boromand, supra; Matter of Teng, supra; Matter of S-, supra; Matter of T-, supra. Here, the immigration judge found the respondent's testimony to lack credibility. After a careful review of this record, we find no reason to disturb the immigration judge's findings. The respondent cannot escape responsibility for the actions of the SS guards at the Gross-Rosen concentration camp by claiming that he did not know what was going on at Gross-Rosen. Deportability under section 241(a) (19) of

the Act does not require specific evidence that the respondent engaged in acts of brutality against the prisoners. Section 241(a) (19) makes an alien deportable if he merely "assisted" in the persecution of others. Based on the testimony of the Government's witnesses, which the immigration judge found credible, the record clearly establishes that persecution was systematic and ongoing at Gross-Rosen and that the respondent was aware of it.

Similarly, the respondent's deportability under section 241(a) (19) of the Act is not defeated by his contention that his service at the camp was involuntary because he was denied a transfer from Gross-Rosen and that he merely obeyed orders. Matter of Fedorenko, supra. Congress intended that all who assisted the Nazis in persecuting others must be deported regardless of the degree of voluntariness of such assistance. We have already held that the actions of a Ukrainian prisoner of war who was forced by the Nazis to guard the perimeter of a concentration camp constituted assistance in persecution within the meaning of section 241(a) (19) of the Act because his actions would have aided the Nazis in their confinement of the prisoners at the camp. Id. Thus, it is not determinative whether the

respondent himself committed that involuntary confinement alone, if based solely on race, religion, or political opinion, constitutes persecution. See Blazina v. Bouchard, 286 F.2d 507 (3d Cir. 1961). Therefore, the respondent's duty as a perimeter guard to prevent prisoners escaping from their slave labor at Gross-Rosen is sufficient to establish his assistance to the Nazi regime's persecution of these prisoners. Fedorenko v. United States, 449 U.S. 4490 (1981); Matter of Fedorenko, supra. The respondent's involvement in supervising and training prison guards at the Gross-Rosen concentration camp also clearly constituted assistance in persecution within the meaning of section 241(a) (19) of the Act because his actions would have significantly aided the Nazis in their confinement of the prisoners at the camp. Therefore, we do not need to reach the additional allegation that the respondent assisted in the persecution of the Gross-Rosen prisoners while they were evacuated to the Mauthausen concentration camp in January 1945.

(2) Persecution "because of race, religion, . . . or political opinion."

The evidence presented clearly establishes that many Jews, Catholics, Jehovah's Witnesses,

and political prisoners were confined at the Gross-Rosen concentration camp. The record further reflects that the Gross-Rosen prisoners were classified on the basis of their religious or political beliefs, and that these classes of prisoners were abused and treated much worse than the common criminals incarcerated there. The absence of evidence that the respondent had either religious or political motivations for his actions does not alter the fact that he "assisted" in physical persecution which occurred "because of" official policies directed against people of the Jewish race and religion, of other religions, and of different political beliefs. Matter of Fedorenko, supra; Matter of Laipenieks, supra.

We reject the respondent's contention that Gross-Rosen contained mainly criminal prisoners and that, therefore, his duties there were akin to those of a prison guard. The evidence clearly establishes that the majority of those incarcerated were political, racial, or religious prisoners, and that in fact, criminals were the preferred class of prisoners at Gross-Rosen. Moreover, the respondent admits that his prior duties in the Totenkopf Division of the Waffen SS in occupied

Russia and France were not of a military nature.[3] Rather, they related to Nazi security measures against the enemies of the Third Reich (Tr. at 151-52, 167-69). These past security duties were consistent with the persecutive nature of his latter duties as a concentration camp guard and guard leader at Gross-Rosen. It was, in fact, the policy of the Totenkopf Division to regularly rotate personnel from the front to the concentration camps (Exh. 42 at 321-25). We find that the respondent's guard duties at Gross-Rosen clearly constituted assistance in persecution "because of race, religion, . . . or political opinion."

The respondent's reliance on Laipenieks v. INS, supra, and the findings at The Nurnberg Trial, 6 F.R.D 69 (1946), for his contention that he did not engage in persecution is misplaced. Nothing in these decisions compels a different result. The respondent volunteered for the Totenkopf Division

---

3 The respondent joined the Totenkopf division of the Waffen Ss on June 20, 1940, when the Waffen SS was relatively select, prior to its absorption of the Baltic legions and other non-German military units during the latter stages of WWII.

of the SS, whose primary purpose had been the management of the SS concentration camp system. The Totenkopf committed many wartime atrocities, even while distinguishing itself for its fighting capabilities in WWII. The respondent's military career in the Totenkopf, as detailed above, primarily consisted of being a guard and training the guards who made the brutal Nazi concentration camp system achieve its goals. The fact that Gross-Rosen's primary role was the exploitation of the able-bodied victims of Nazi persecution, instead of the immediate extermination of its weaker victims, as was the function of the camp at Treblinka, did not change its persecutive nature. The Nurnberg court specifically found the slave labor policies by Nazi occupation forces to be war crimes. The Nurnberg Trial, supra, at 123-26, 143. We specifically hold that Waffen SS personnel who actively participated in the management of Nazi concentration camps thereby engaged in persecution as defined in section 241(a) (19) of the Act.

(3) "Under the direction of, or in association with the Nazi government of Germany."

The evidence presented also establishes that as a concentration camp guard, guard leader, and guard trainer, the respondent served in the Nazi

SS. Thus, these findings clearly demonstrate that his activities at the Gross-Rosen concentration camp were "under the direction of, or in association with" the Nazi government of Germany. Matter of Fedorenko, supra.

Accordingly, the facts discussed above show by clear, unequivocal, and convincing evidence that from 1940 to 1945, under the direction of, or in association with, the Nazi government of Germany, the respondent assisted in the persecution of persons because of their race, religion or political opinion. therefore, the immigration judge correctly found the respondent deportable pursuant to section 241(a)(19) of the Act.

CONSTITUTIONAL CONTENTIONS

The respondent argues that he may not be found deportable pursuant to section 241(a)(19) because it is an unconstitutional ex post facto law or bill of attainder. This argument lacks any merit whatsoever. See Artukovic v. INS, 693 F.2d 894 (9th Cir. 1982). It is well settled that the creation of a retroactive ground for deportation does not violate the ex post facto laws prohibition. Marcello v. Bonds, 349 U.S. 302, 314 (1955); Galvan v. Press, 347 U.S. 522, 531 (1954); Harisiades v. Shaugh-

nessy, 342 U.S. 580, 594 (1952). That prohibition applies only to criminal statutes, and deportation laws are civil, not criminal, in nature. Marcello v. Bonds, supra; Galvan v, Press, Supra; Harisiades v. Shaughnessy, supra. Moreover, the courts have rejected the argument that a deportation provision is an unconstitutional bill of attainder. See, e.g., MacKay v. McAlexander, 268 F.2d 35 (9th Cir. 1959), cert. denied, 362 U.S. 961 (1960); Quattrone v. Nicholls, 210 F.2d 513, 519 (1st Cir.), cert. denied, 347 U.S. 976 (1954). The constitutional prohibition against bills of attainder was intended to prevent legislative punishment and trial by legislature. United States v. Brown, 381 U.S. 437, 442-44 (1965). This is clearly not the effect of section 241(a)(19) of the Act, as deportation is not a form of punishment (Harisiades v. Shaughnessy, supra, at 594), and section 241(a)(19) does not deprive an alien of his right to a full evidentiary hearing on the issue of his deportability, with the right to judicial review. See sections 106(a) and 242 (b) of the Act, 8 U.S.C. sections 1106(a) and 1252(b) (1982).

We have recognized that there are harsh consequences for aliens who once assisted in Nazi persecution and now claim that their assistance was involuntary. See Matter of Fedorenko, supra,

at 18. However, it is clear from the legislative history of section 241(a)(19) that Congress intended such consequences. See H.R. Rep. No. 1452, 95th Cong., 2d Sess. 3, reprinted in, 1978 U.S. Code Cong. and Ad. News, 4700, 4702-05. We also reject the respondent's contention that he was unfairly denied discovery in his deportation hearing. See Marroquin-Manriquez v. INS, 699 F.2d 129 (3rd Cir. 1983); Quattrone v. Nicholls, supra. The respondent had full knowledge of the evidence used against him. In view of the many continuances in order to allow the respondent to prepare his case, the respondent's contention that he was not allowed sufficient time to prepare for cross-examination is not convincing.

ADDITIONAL GROUNDS OF DEPORTABILITY

We also conclude that the record sufficiently establishes the additional charges of deportability that the respondent entered the United States by fraud and with an invalid immigrant visa. The respondent admitted that he misrepresented his wartime military service to immigration authorities by claiming to have served in the German Army (Wehrmacht) instead of the Totenkopf Division of the Waffen SS, thus concealing his concentration camp guard duty (Exh. 27 at 60-63). This mis-

representation was clearly material and rendered the respondent excludable at entry under section 212(a)(19) of the Act. See Matter of S-B and C-, 9 I&N Dec. 436 (BIA 1960; A.G. 1961); cf. Suite v. INS, 594 F.2d 972 (3d Cir. 1979). He specifically admits that he concealed his wartime activities in order to obtain an immigration visa to enter the United States (Exh. 27 at 63). Such an admission also renders the respondent excludable at entry under section 212(a)(20) of the Act for lack of a valid immigrant visa. Fink v. Reiner, 96 F.2d 217 (2d Cir.), cert. denied, 305 U.S. 618 (1938); Matter of Agustin, 17 I&N Dec. 14 (BIA 1979); Matter of Da Lomba, 16 I&N Dec. 619 (BIA 1978). The immigration judge's decision will be modified to included these additional findings of deportability. Inasmuch as we do not find it necessary to determine the respondent's deportability under section 241(a)(2) of the Act, we decline to comment on these charges.

RESPONDENT'S ELIGIBILITY FOR RELIEF FROM DEPORTATION.

The respondent has not argued that the immigration judge erred in finding him ineligible for relief from deportation under sections 241(f), 244(a), and 244 (e) of the Act, 8 U.S.C. sections

1251(f), 1254(a) and 1254(e) (1982). Relief afforded under each of these provisions is unavailable to an alien who is deportable pursuant to section 241(a)(19) of the Act. See sections 241(f)(1)(A) and 244(a) of the Act, as amended by Pub. L. No. 97-116, sections 8 and 18(h)(2), 95 Stat. 1611, 1616, 1620 (1981) (codified as amended at 8 U.S.C. sections 1251(f)(1)(A) and 1254(a) (1982), respectively); section 244(e) of the Act, as amended by Pub. L. No. 95-549, section 105, 92 Stat. 2065, 2066 (1978) (codified as amended at 8 U.S.C. section 1254(e) (1982)); see also Matter of Fedorenko, supra; Matter of Laipenieks, supra. Since the respondent is deportable pursuant to section 241(a)(19) of the Act, he is precluded as a matter of law from obtaining the relief sought, and the immigration judge correctly denied the respondent's applications.

ORDER: The appeal is dismissed.

Chairman

JUDGMENT ORDER

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 5, 1987

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. ROBERT A. GRANT, Senior District Judge*

REINHOLD KULLE,	) Petition
Petitioner,	) for Review
	) of an Or-
No. 86-1277 v.	) der of the
	) Board of
IMMIGRATION AND NATURALIZATION	) Immigra-
SERVICE,	) tion Ap-
Respondent.	) peals

This cause was heard on the record from the Board of Immigration Appeals, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the decision of the Board of Immigration Appeals is AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

---

* The honorable Robert A. Grant, Senior Judge for the Northern Distrcit of Indiana, sitting by designation.

(2)

No. 87-716

In the Supreme Court of the United States

OCTOBER TERM, 1987

REINHOLD KULLE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

15pp

QUESTIONS PRESENTED

1. Whether the immigration judge properly found petitioner deportable under Section 241(a)(19) of the Immigration and Nationality Act (the Holtzman Amendment) on the ground that, as a concentration camp guard, he engaged in the persecution of persons because of their race, religion, nationality, or political opinions.

2. Whether petitioner's false statement on his visa application, where he claimed that he was in the *Wehrmacht* (the German Army) during World War II, when in fact he was in the "Death's-Head" Division of the *Waffen* SS and served as a concentration camp guard, constituted a misrepresentation of a material fact, within the meaning of Section 212(a)(19) of the Immigration and Nationality Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-716

REINHOLD KULLE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 825 F.2d 1188. The opinion of the Board of Immigration Appeals (Pet. App. B1-B40) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1987. The petition was filed on October 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). For the reasons discussed below, however, we submit that in light of the fact that petitioner has already been deported, this Court does not have jurisdiction to consider petitioner's claims. See 8 U.S.C. 1105a(c).

STATEMENT

1. Petitioner is a German citizen who was admitted to the United States as a lawful permanent resident on November 7, 1957. On December 3, 1982, an order to

show cause was served on petitioner, alleging that he was deportable under Section 241(a)(19) of the Immigration and Nationality Act, 8 U.S.C. (& Supp. IV) 1251(a)(19) (the Holtzman Amendment), as a person who had assisted in the persecution of others due to race, religion, nationality, or political beliefs in association with the government of Nazi Germany. The order to show cause also alleged that petitioner was deportable under Section 241(a)(1) of the Act, 8 U.S.C. 1251(a)(1). He was deportable under that provision, the order alleged, because at the time of his entry he was excludable by law under Sections 212(a)(19) and 212(a)(20) of the Act, 8 U.S.C. (& Supp. IV) 1182(a)(19) and 1182(a)(20), on the ground that he had procured his visa by fraud and by willfully misrepresenting a material fact. The alleged misrepresentation was petitioner's statement, in applying for his visa, that during World War II he had served in the *Wehrmacht*, the German Army, when in fact he had been in the *Waffen* SS and in that capacity had served as a concentration camp guard.

The order to show cause alleged that from 1940 to 1945, petitioner was an enlisted member of the *Waffen* SS and served in its "Death's-Head" Division. As a member of that organization, petitioner was assigned to duty at the Gross-Rosen concentration camp in what was then eastern Germany, where he was alleged to have acted as a guard for prisoners sent to do forced labor. See Pet. App. B6-B8.

After a lengthy hearing (see Pet. App. B4-B5, B10-B23), the immigration judge found by clear and convincing evidence that petitioner was subject to mandatory deportation under the Holtzman Amendment, Section 241(a)(19) of the Act, 8 U.S.C. (& Supp. IV) 1251(a)(19). The immigration judge heard four former inmates and an expert witness testify about the conditions at the Gross-Rosen concentration camp. Those witnesses, whom the immigration judge found credible, testified that Gross-Rosen

was a forced labor camp principally for Polish political prisoners and members of other ethnic and national origin groups. Based on the testimony of those witnesses, the immigration judge found that petitioner had "assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion" (8 U.S.C. (& Supp. IV) 1251(a)(19)), and that he was therefore deportable under the Holtzman Amendment. Pet. App. B5. In light of that finding, the immigration judge found it unnecessary to decide whether there were other grounds on which petitioner was also deportable.

The Board of Immigration Appeals affirmed (Pet. App. B1-B40). In addition to finding petitioner deportable under Section 241(a)(19), the Board found that the record at the hearing before the immigration judge established that petitioner was also deportable under Sections 212(a)(19) and 212(a)(20) of the Act, 8 U.S.C. (& Supp. IV) 1182(a)(19) and 1182(a)(20), because he made material false statements in his visa application concerning his military service record (Pet. App. B38-B39). Finally, the Board held that petitioner was ineligible for discretionary relief from deportation (*id.* at B39-B40).

2. The court of appeals also affirmed (Pet. App. A1-A23). The court held that there was clear and convincing evidence, based on the expert testimony and the testimony of the four former camp inmates, that the Gross-Rosen concentration camp was a place of "persecution" within the meaning of the Holtzman Amendment and that petitioner, as a camp guard, had "assisted" in that persecution, even though the evidence did not show that petitioner was personally involved in any specific atrocities (*id.* at A10-A14). The court further held that the immigration judge conducted the hearings fairly and in accordance with the rules governing deportation proceedings (*id.* at A14-A17).

As an alternative ground supporting the order of deportation, the court upheld the Board's conclusion that peti-

tioner had made material false statements on his visa application, which rendered his entry fraudulent. As the court noted, petitioner stated in his visa application only that he had been "in the Army"; however, petitioner had admitted that because he feared that his application would be disapproved if he disclosed the true nature of his wartime occupation, he did not reveal that he had been a member of the *Waffen* SS and had served as a guard at the Gross-Rosen concentration camp (Pet. App. A18-A23).

Almost two months after the court of appeals entered its judgment, petitioner applied to this Court for a stay of deportation. Justice Stevens denied the motion for a stay, and petitioner was deported to the Federal Republic of Germany on October 26, 1987.

ARGUMENT

1. As a threshold matter, we submit that this Court does not have jurisdiction to consider petitioner's claims. Petitioner was deported from the United States on October 26, 1987. Although he challenges the grounds on which the deportation order was based, he does not suggest that the deportation itself was unlawful or that it was effected in an unlawful manner. Section 106(c) of the Immigration and Nationality Act provides that an order of deportation "shall not be reviewed by any court if the alien * * * has departed from the United States after the issuance of the order" (8 U.S.C. 1105a(c)). That statute has been held to bar judicial review of a deportation order once the alien has left the country. See *Umanzor* v. *Lambert*, 782 F.2d 1299 (5th Cir. 1986).

Some courts have held that the term "departed" is limited to voluntary departures and legally executed deportations. See *Newton* v. *INS*, 622 F.2d 1193, 1195 (3d Cir. 1980); *Mendez* v. *INS*, 563 F.2d 956, 958 (9th Cir. 1977); see also *Umanzor* v. *Lambert*, 782 F.2d at 1306 (Brown, J., dissenting). In this case, petitioner does not

suggest that there was anything wrong with the manner in which the Immigration and Naturalization Service effected his deportation; his complaint is with the process that led up to the issuance of the deportation order. Therefore, even under the court-made exception to 8 U.S.C. 1105a(c) for deportations that are "illegally executed," petitioner is not entitled to continue litigating his present claims after his departure from the country.[1] That statutory bar is sufficient in itself to call for denial of the petition.

2. Even if this Court has jurisdiction to review petitioner's deportation order, there is no reason for it to exercise that jurisdiction by granting the petition in this case. Petitioner was ordered deported on two independent grounds, each of which is sufficient to justify the relief granted. Petitioner's challenges to each of the two grounds for deportation involve mainly factual disputes about the nature of the government's proof at the deportation hearing and about the extent to which the immigration judge permitted petitioner to contest that proof.

a. Petitioner's principal claim (Pet. 25-54) is that he was improperly found to have assisted the Nazi government in persecuting individuals because of their race, religion, nationality, or political opinion.

---

[1] To be sure, a Sixth Circuit decision and some decisions in the Ninth Circuit appear to hold that the "illegally executed" exception to 8 U.S.C. 1105a(c) applies to any challenge to the procedures that lead up to the issuance of the deportation order. See *Juarez* v. *INS*, 732 F.2d 58, 59-60 (6th Cir. 1984); *Thorsteinsson* v. *INS*, 724 F.2d 1365, 1367-1368 (9th Cir.), cert. denied, 467 U.S. 1205 (1984); *Estrada-Rosales* v. *INS*, 645 F.2d 819, 820-821 (9th Cir. 1981). We submit that those decisions, if carried to their logical limits, would render 8 U.S.C. 1105a(c) a dead letter except as it applies to persons who voluntarily depart after the issuance of a deportation order, a result that is at war with the plain language of the provision. See *Umanzor* v. *Lambert*, 782 F.2d at 1303.

The dispute on this issue is a narrow one. Petitioner concedes that he worked as a guard at the Gross-Rosen concentration camp during World War II. The Holtzman Amendment to the Immigration and Nationality Act, 8 U.S.C. (& Supp. IV) 1251(a)(19), provides for the exclusion of any person who, under the direction of the Nazi government of Germany, assisted in "the persecution of any person because of race, religion, national origin, or political opinion." A person who served as a guard at a concentration camp in which such persecution took place is deemed to have "assisted" in that persecution, even if the person is not shown to have been directly involved in particular acts of persecution. See *Fedorenko* v. *United States*, 449 U.S. 490, 512 (1981) (participation as an armed guard at a concentration camp constitutes assisting in persecuting civilians within the meaning of the parallel provision of the Displaced Persons Act); *Schellong* v. *INS*, 805 F.2d 655 (7th Cir. 1986), cert. denied, No. 86-1158 (Apr. 6, 1987). Petitioner's claim is that the immigration judge, the Board of Immigration Appeals, and the court of appeals were wrong in concluding that the evidence at the deportation hearing showed that the Gross-Rosen concentration camp was a place of persecution, rather than a simply a prison for ordinary criminals (see Pet. 26).

Most of the government's evidence at the deportation hearing was addressed to this issue. The evidence is summarized both by the Board of Immigration Appeals (Pet. App. B10-B23) and by the court of appeals (*id.* at A7-A9). It consisted of detailed accounts from four former inmates at the Gross-Rosen concentration camp, who testified about their experiences at the camp, and an expert witness—a professor of modern German history specializing in the Nazi period. Those witnesses testified that Gross-Rosen was not simply a prison for ordinary criminals, but that it was a labor camp for persons from groups disfavored by the Nazi regime, including members

of certain religious groups, such as Jews and Jehovah's Witnesses, political prisoners, and persons of non-Germanic nationality. Inmates from each of those groups were identified by different colored patches they wore on their prison garb, and members of certain groups were systematically treated more harshly than members of other groups (*id.* at B13-B14). The witnesses testified that there were some ordinary criminals in Gross-Rosen, but that those prisoners were treated best of all and were placed in charge of the other inmates (*id.* at B14). In addition, the evidence showed that in late 1943 and 1944, some 10,000 Jewish prisoners were transported from Auschwitz to Gross-Rosen, and that many of them were killed at Gross-Rosen by the SS guards during the winter of 1945 to prevent their liberation by the advancing Russian armies (*id.* at B16). Although petitioner cross-examined each of the government's witnesses at great length,[2] the immigration judge credited their testimony.

In challenging the testimony of the inmate witnesses, petitioner suggests that each of them was an ordinary criminal (see Pet. 7). In fact, the undisputed evidence shows that the witnesses' "crimes" were "ordinary" crimes only in an extraordinary society like Nazi Germany. They were incarcerated for crimes such as writing a letter describing a speech by Winston Churchill (Pet. App. B17), and participating in the Polish underground movement (*id.* at B22-B23); each was forced to wear a patch

---

[2] Petitioner claims that he was not given an adequate opportunity to cross-examine the witnesses, but the record shows that the immigration judge permitted extended cross-examination of each of the government's witnesses. Cross-examination of each of the inmate witnesses covered between 146 and 455 pages of the transcript (the direct examination of those witnesses was approximately one-third as long as the cross-examination). The cross-examination of the government's expert witness covered almost 700 pages of the transcript (his direct examination was slightly over 200 pages in length).

designating him as a Polish political prisoner. In any event, regardless of the reason each of the inmate witnesses was sent to Gross-Rosen, their testimony regarding the activities that occurred there was powerful, consistent, and the most reliable source available from which to determine whether Gross-Rosen was a place of persecution, as the government alleged.

With regard to the government's expert witness, petitioner contends (Pet. 34-48) that although his credentials as an expert were generally unobjectionable, he did not have enough information about Gross-Rosen to testify reliably about the nature of the activities there, and he relied too heavily on an eyewitness account of Gross-Rosen written by another government witness, Mieczyslaw Moldawa. But petitioner had an ample opportunity to cross-examine both the expert and Moldawa, and the immigration judge nonetheless found their testimony persuasive, particularly in conjunction with the testimony of the other three former inmates who testified consistently about the nature of the Gross-Rosen concentration camp.

At bottom, petitioner's contention is that the immigration judge should not have believed the five government witnesses, even though petitioner offered no contrary evidence regarding the nature of the activities at Gross-Rosen (he testified at the hearing, but his position was that he was merely assigned to guard the perimeter of the camp and did not know what went on inside the camp). Petitioner's claim regarding the sufficiency of the credible evidence has been rejected by the immigration judge, the Board of Immigration Appeals and the court of appeals; it does not warrant further review by this Court.[3]

---

[3] Petitioner complains that he was not allowed sufficient discovery in the course of the deportation proceedings. There is, however, no right to discovery in deportation proceedings. See *Marroquin-Manriquez* v. *INS*, 699 F.2d 129 (3d Cir. 1983), cert. denied, 467 U.S. 1259 (1984); *Quattrone* v. *Nicolls*, 210 F.2d 513 (1st Cir.), cert.

b. Petitioner also contends (Pet. 9-22) that his statement to immigration officials that he was in the German Army (the *Wehrmacht*), when in fact he was in the *Waffen* SS, was not a material misrepresentation that should subject him to deportation. He contends that this issue is similar to the issue presently before the Court in *Kungys* v. *United States*, No. 86-228, and that this case should be held for *Kungys*.

---

denied, 347 U.S. 976 (1954). In any event, the government provided a great deal of material to petitioner before and during the hearing. Although petitioner contends that he did not have those materials early enough to make use of them, the deportation hearing was twice continued at petitioner's request; as a result it ended up extending over a ten-month period. The continuances gave petitioner ample time to prepare to meet the government's proof. If petitioner believed that he had not had an adequate opportunity to challenge the testimony of any of the government's witnesses, he could have recalled any of them during his own case for further examination, but he did not seek to do so.

There is no merit to petitioner's claim (Pet. 32-34) that the immigration judge erred by refusing to provide petitioner with copies of the immigration records of two of the government's witnesses. Petitioner has not suggested any reason to believe that those materials could have been helpful to him. Those documents relating to the witnesses' general background are quite different from the prior statement of a witness directly relating to his testimony, which was the document at issue in *Carlisle* v. *Rogers*, 262 F.2d 19 (D.C. Cir. 1958), on which petitioner relies. In sum, petitioner has failed to show that the absence of a right to general discovery had the effect of denying him a fundamentally fair deportation hearing.

Petitioner's further assertion (Pet. 32) that the government "redacted" the "Ludwigsburg papers" is baseless. Those papers are the contemporaneous German documents concerning Gross-Rosen and other concentration camps that were found in the investigative files of the German prosecution in Ludwigsburg, Germany. The government's expert had examined the papers, and he referred to them in the course of his testimony; petitioner cross-examined the expert witness about the papers, but he does not appear to have attempted to obtain a copy of any of them. There is no ground for his claim that the papers were "redacted."

There is no need to hold this case pending the disposition of *Kungys*. First, because the false statement issue was only one of the two independent grounds for petitioner's deportation, it would not change the result in this case even if petitioner were to prevail on that issue. Second, this case is different from *Kungys* in several important respects. In this case, petitioner has admitted making false statements on his visa application; in a 1982 interview with a Department of Justice representative, he admitted having lied when he stated that he was in the German Army (Pet. App. A19-A22). He also admitted that he made that false statement in order to procure a visa; if he had told the truth, he admitted, he feared that he would have been denied entry into this country (*id.* at A20-A21). Finally, the government introduced unequivocal proof—in the form of an affidavit from the vice-consul who processed petitioner's visa application—that if she had known that petitioner had been in the *Waffen* SS and had served as a concentration camp guard, she would not have issued him a visa, because at the time of petitioner's application, wartime service of that sort would have disqualified a visa applicant at the American Consulate-General in Frankfurt, where petitioner applied for and obtained his visa (*id.* at A18-A19). In light of these facts, all of which were brought out at the deportation hearing, it is difficult to imagine how petitioner's false statement could be found to be immaterial under any standard: He made the false statement for the purpose of gaining admission to this country, and if he had told the truth, he would not have been admitted.

Petitioner has two responses. First, he claims (Pet. 9-19) that at the time of his visa application, there was no provision of law that would have resulted in his exclusion because of his service as a concentration camp guard. Therefore, he claims, the vice-consul could not lawfully have denied him a visa on that ground, and his false statement was therefore immaterial. In fact, however, the vice-consul stated in her affidavit that it was the practice of the

consulate at that time not to issue immigrant visas to persons who had engaged in wartime activities such as performing service as a concentration camp guard. Petitioner's false statement was therefore material in the most basic sense that it made the difference between admission and exclusion.

Second, petitioner claims (Pet. 19-22) that a document that he presented with his visa application should have put the consular officials on notice that he had served as a guard at the Gross-Rosen concentration camp. The document in question was a certificate that showed that he had been married during the war at Gross-Rosen. It would have taken remarkable ingenuity for the consular officials to conclude from that document that petitioner, who claimed to have been in the German Army, was in Gross-Rosen because he was serving as a concentration camp guard and therefore must have been in the *Waffen* SS, not the *Wehrmacht*. Petitioner cannot place such reliance on the consular officials' knowledge of German wartime affairs and their powers of inference to overcome the misleading effect of his own falsehood. Because petitioner made an admittedly false statement that was material under any standard, he was excludable under 8 U.S.C. (& Supp. IV) 1182(a)(19) and thus deportable under 8 U.S.C. 1251(a)(1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

JANUARY 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60214